92-1991

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CHARLES S. DEAN,
Sheriff of Citrus County, Florida, and
ROBERT A. BUTTERWORTH, the Attorney General
of the State of Florida,

Petitioners,

v.

JOSEPH RICHARD REDNER,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the court of appeals' dismissal of petitioner's appeal for lack of jurisdiction, because it construed a postjudgment motion for reallocation of costs to be a Rule 59(e) motion tolling the time for the filing of the appeal, was contrary to applicable decisions of this Court, and of other United States Courts of Appeals.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Dean (who was an Appellant in the proceedings below) was a Respondent in the initial habeas corpus proceedings in the district court. Co-Petitioner Butterworth, who (joins in this petition for writ of certiorari, was also an Appellant in the proceedings below and a Respondent in the district court). Respondent Redner (who was Appellee in the proceedings below) was the Petitioner for the writ of habeas corpus in the district court.

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PETITION FOR WRIT OF CERTIORARI

Charles S. Dean, Sheriff of Citrus County, Florida, and Robert A. Butterworth, the Attorney General of the State of Florida, petition this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, to review and correct an order of that court entered January 20, 1993 (set out as Appendix J to this petition), dismissing an appeal (Case No. 92-2615) for lack of jurisdiction.

BASIS OF JURISDICTION

On April 20, 1993, Justice Anthony M. Kennedy granted Petitioner Dean's application for extension of time for filing a petition for writ of certiorari to and including June 15, 1993 (Appendices K and L).[1]

[1] Because this petition for writ of certiorari originally should have been filed no later than April 20, 1993, the application for extension of time within which to file the petition was requested from Justice Kennedy because it was hoped that a ruling from the court of appeals would make unnecessary this petition. If the court of appeals should deny Respondent Redner's challenge to Petitioner Dean's right to appeal (by the second, October 13, 1992 notice of appeal) the substantive merits of the district court's ruling on the habeas corpus petition, that denial would render moot the need for this petition for writ of certiorari.

The court of appeals has not yet ruled on Respondent Redner's motion to strike or dismiss (challenging the second appeal); but if that court were to sustain such a challenge, then such an inconsistency by the court of appeals will require this endeavor to obtain relief from this Court, (1) by clarifying the nature of postjudgment motions involving costs (such as the

This Court has jurisdiction to review the decision of the court of appeals, pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS

28 U.S.C. § 1291 states, in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court. . . .

STATEMENT OF THE CASE

This matter began as a habeas corpus proceeding in the United States District Court, Middle District of Florida. Respondent, Joseph Richard Redner (Redner), as petitioner in the district court, sued both the Sheriff of Citrus County, Florida, Charles S. Dean (Dean), who had custody of the Respondent, Redner, and the Attorney General of the State of Florida, Robert Butterworth (Butterworth, the Florida attorney general), as the chief law enforcement officer of the State.

On May 18, 1992, the district court accepted the recommendation of a magistrate judge, and entered an

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ambiguous one by Co-Petitioner Butterworth), and (2) by rectifying the court of appeals' January 20, 1993 order that construed Co-Petitioner Butterworth's motion as a Rule 59(e) motion, and dismissed the first appeal for lack of jurisdiction.

order, granting the petition for writ of habeas corpus, and directing that "the necessary steps [be taken] to set aside [Respondent Redner's] conviction and to discharge him from any restraint." A civil judgment was entered by the clerk that same day (in accordance with that order), and allowed for the assessment of costs pursuant to 28 U.S.C. § 1920 (Appendix A).

On May 20, 1992, Co-Petitioner Butterworth filed a motion with the district court entitled "Motion for Relief from Judgment, Motion to Amend Judgment" (Appendix C). By that motion, he requested that the district court assess any costs, pursuant to the civil judgment, against Petitioner Dean only, and not against Co-Petitioner Butterworth. Perceiving himself to have been abandoned by the Florida attorney general, Petitioner Dean opposed that motion, urging the district court to continue to recognize[2] the obligatory role and position of the attorney general as the chief defender of the interests of the state (Appendix D).

While that motion was pending, and because of the uncertainty concerning the nature of the motion, Petitioner Dean filed on June 17, 1992 a notice of appeal from the district court's May 18, 1992 civil judgment (Appendix B). The United States Court of Appeals for the Eleventh Circuit requested the parties to submit briefs on the question of its appellate review jurisdiction, over the

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[2] The district court, earlier in the course of this litigation, had rejected a motion by the Florida attorney general to be dismissed from the habeas corpus proceedings, noting that under federal law it was appropriate that a state's attorney general should be included as a respondent to the petition.

appeal brought by the June 17, 1992 notice of appeal, in light of the motion by Co-Petitioner Butterworth (Appendix F). Petitioner Dean furnished the court of appeals with a brief on September 8, 1992.

On September 15, 1992, the district court granted the motion of the Florida attorney general, Co-Petitioner Butterworth, (Appendix G) and entered an amended judgment (amending the final judgment of May 18, 1992) "to relieve Co-Petitioner Butterworth from the responsibility for costs and of setting aside [Respondent Redner's] judgment of conviction"[3] (Appendix H).

Eventually, on January 20, 1993, the court of appeals dismissed the appeal from the May 18, 1992 judgment "for lack of jurisdiction," ruling that the postjudgment motion by the Florida attorney general "is properly construed as a Fed. R. Civ. P. 59(e)[4] motion which tolled the time for filing a notice of appeal and rendered the appeal [from the May 18, 1992 judgment] premature and ineffective"[5] (Appendix J).

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[3] On October 13, 1992, Petitioner Dean filed a second, separate notice of appeal, stemming from the district court's September 15, 1992 amended civil judgment.

[4] Rule 59(e) states: "[a] motion to alter or amend a judgment shall be served not later than ten days after entry of the judgment."

[5] The court of appeals expressly declared that its "dismissal does not affect [Petitioner] Dean's second appeal filed [from the amended judgment] following the district court's disposition of that motion."

In his "second appeal," Petitioner Dean has filed in the court of appeals a brief addressing the merits of the amended judgment, entered September 15, 1992, which includes the

This petition for writ of certiorari seeks review of the court of appeals' January 20, 1993 order dismissing the appeal from the May 18, 1992 judgment "for lack of jurisdiction," because that order – improperly construing the Florida attorney general's postjudgment motion concerning costs as a Rule 59(e) motion which would toll the time for filing a notice of appeal – conflicts with decisions from this Court concerning the collateral nature of postjudgment motions and orders addressing issues of costs. This error, in turn, led the court of appeals to conclude erroneously that the appeal from the May 18, 1992 judgment (which had been entered before the resolution of Co-Petitioner Butterworth's motion) was premature and ineffective, and to dismiss that appeal.

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issues presented in the district court's initial decision on the merits, as well as the additional issue presented in the district court's amended judgment. Respondent Redner (as expected) has challenged, by a motion to strike or dismiss in the court of appeals, the right of Petitioner Dean to appeal (by the second appeal) the district court's ruling on the substantive merits of the habeas corpus petition (Appendices M and N).

ARGUMENT: REASONS FOR ISSUING THE WRIT OF CERTIORARI

I. THE COURT OF APPEALS' DISMISSAL OF PETITIONER'S APPEAL FOR LACK OF JURISDICTION, BECAUSE IT CONSTRUED A POSTJUDGMENT MOTION FOR THE REALLOCATION OF COSTS AS A RULE 59(e) MOTION TOLLING THE TIME FOR THE FILING OF THE APPEAL, WAS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT, AND OF OTHER UNITED STATES COURTS OF APPEALS.

This petition for writ of certiorari presents the question whether a civil judgment, granting a petition for writ of habeas corpus is a "final decision" as a matter of federal law under 28 U.S.C. § 1291, for purposes of appellate review, when a postjudgment motion to reallocate costs has been filed and is pending. The Court of Appeals for the Eleventh Circuit ruled that the postjudgment motion was a Rule 59(e) motion, and that the judgment was not a "final decision" under § 1291.

A. A RULE 59(e) MOTION TO ALTER OR AMEND A JUDGMENT AFFECTS THE VALIDITY OF ANY NOTICE OF APPEAL FILED BEFORE A RULING ON THAT MOTION, BECAUSE IT NECESSARILY REQUESTS A RECONSIDERATION OF MATTERS INVOLVING OR INHERENT IN THE MERITS OF THE JUDGMENT.

Fed. R. App. P. 4(a)(4) states:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: . . . (iii) under Rule 59 to alter or

> amend the judgment, . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

By the 1979 amendments to the Federal Rules of Appellate Procedure, "the district court was given express authority to entertain a timely motion to alter or amend the judgment under Rule 59, even after a notice of appeal had been filed." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). "The 1979 amendments eliminated the potential for conflict" between courts of appeals and district courts having concurrent jurisdiction to modify simultaneously the same judgment, "by depriving the courts of appeals of jurisdiction in such [Rule 59] situations." *Id.* at 60, 103 S.Ct. at 403.

The "effect of a Rule 59 motion on a previously filed notice of appeal" has been described as "the appeal simply self-destructs." *Id.* at 61, 103 S.Ct. at 403, quoting 9 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 204.12[1], p. 4-70, n.17 (1993). "Moreover, a subsequent notice of appeal is ineffective if it is filed while a timely Rule 59 motion is still pending." *Id.* "[A] notice of appeal filed while a timely Rule 59(e) motion is pending has no effect." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174, 109 S.Ct. 987, 990, 103 L.Ed.2d 146 (1989).

A notice of appeal filed before or after a timely motion under Rule 59 is "not merely defective; it [is] a nullity." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. at 60, 103 S.Ct. at 403.[6]

> Under the plain language of the current Rule, a premature notice of appeal "shall have no effect"; a new notice of appeal "must be filed." In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is " 'mandatory and jurisdictional.' "

Id. Accord Cobb v. Miller, 818 F.2d 1227, 1238 (5th Cir. 1987) (Rule 59(e) motion makes judgment nonfinal and delays running of time for notice of appeal until district court rules on motion).

"Because Federal Rule of Appellate Procedure 4(a)(4) renders ineffective any notice of appeal filed while a Rule 59(e) motion is pending, the decision whether a particular pending motion falls under Rule 59(e) will of necessity determine whether an otherwise final judgment is appealable." *Osterneck v. Ernst & Whinney*, 489 U.S. at 177, 109 S.Ct. at 992.

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[6] *Accord Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 957 F.2d 515, 517 (7th Cir.) ("An appeal filed before the district judge disposes of a motion to alter or amend the judgment drops off the face of the planet."), *cert. denied*, ___ U.S. ___, 113 S.Ct. 91, 121 L.Ed.2d 53 (1992).

1. Postjudgment motions for attorneys fees & Rule 59(e).

"[T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White v. New Hampshire Dep't. of Employment Security*, 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, 71 L.Ed.2d 325 (1982). In that case, a postjudgment motion for attorneys fees under 42 U.S.C. § 1988 was not a Rule 59(e) motion that would affect the validity of a notice of appeal, and the jurisdiction of a court of appeals.

> [A] request for attorneys fees . . . raises legal issues collateral to the main cause of action – issues to which Rule 59(e) was never intended to apply [–]. . . . the [district] court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits.

Id. at 151-52, 102 S.Ct. at 1166. "The award of attorney fees is uniquely separable from the cause of action to be proved at trial." *Id.* at 452. "[T]he collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as final and appealable." *Id.* at 452 n.14, 102 S.Ct. at 1167 n.14.

Then, in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), this Court made uniform its rule in *White v. New Hampshire Dep't. of Employment Security*, holding that, solely as a matter of federal law, a judgment is final and appealable, "for purposes of [28 U.S.C.] § 1291, whether or not there

remains for adjudication a request for attorneys fees[7] attributable to the case." *Id.* at 202-03, 108 S.Ct. at 1722. This "bright-line rule" serves courts and litigants by "preserv[ing] operational consistency and predictability in the overall application of § 1291," and providing certainty about "[t]he time of appealability, [a factor] having jurisdictional consequences." *Id.* at 202.[8]

2. Postjudgment motions for prejudgment interest & Rule 59(e).

Osterneck v. Ernst & Whinney, supra, in contrast, decided that "a postjudgment motion for discretionary prejudgment interest involves the kind of reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply." *Id.* at 176, 109 S.Ct. at 992.

> [U]nlike a request for attorneys fees or a motion for costs, a motion for discretionary prejudgment interest does not "rais[e] issues wholly collateral to the judgment in the main cause of

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[7] At common law, attorneys fees were regarded as an element of "costs" awarded to the prevailing party, see 10 C. Wright & A. Miller, and M. Kane, Federal Practice and Procedure: Civil § 2665 (1983), which are not generally treated as part of the merits judgment, cf. Fed. Rule Civ. Proc. 58 ("Entry of the judgment shall not be delayed for the taxing of costs").
Id. at 200-01, 108 S.Ct. at 1721.

[8] *See Cobb v. Miller,* 818 F.2d at 1237 (motion for attorneys fees under 42 U.S.C. § 1988 was issue collateral to immediately appealable final judgment); *McQurter v. City of Atlanta,* 724 F.2d 881, 882 (11th Cir. 1984) (same).

> action," *Buchanan [v. Stanships, Inc.]*, 485 U.S. [265, 268,] 108 S.Ct. [1130], 1132 [99 L.Ed.2d 289 (1988)]; see *White [v. New Hampshire Dep't. of Employment Security]*, 455 U.S. at 451, 102 S.Ct. at 1166, nor does it require an inquiry wholly "separate from the decision on the merits," *Id.*, at 451-452, 102 S.Ct. at 1166-1167. In deciding if and how much prejudgment interest should be granted, a district court must examine – or in the case of a postjudgment motion, reexamine – matters encompassed within the merits of the underlying action.

Id. at 175, 109 S.Ct. at 991.

B. A POSTJUDGMENT MOTION FOR REALLOCATION OF COSTS IS NOT A RULE 59(e) MOTION: IT IS WHOLLY COLLATERAL TO THE JUDGMENT ON THE MERITS; AND IT DOES NOT AFFECT THE FINALITY OF THE JUDGMENT, OR THE VALIDITY OF A NOTICE OF APPEAL FROM, OR THE COURT OF APPEAL'S JURISDICTION TO REVIEW, THAT JUDGMENT.

Although the postjudgment motion (in the case at hand), which the Florida attorney general entitled "Motion for Relief from Judgment, Motion to Amend Judgment," invoked Rule 59 as its authority, by it he sought a reallocation of costs to be assessed[9] in this case,

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[9] It is true that the Florida attorney general's motion sought to have reallocated solely to Petitioner Dean both the responsibility for any taxable costs, as well as for setting aside the convictions of, and discharging from further restraint, Respondent Redner.

apart from the merits of the district court's decision to grant the petition for writ of habeas corpus.

In *Buchanan v. Stanships, Inc.*, 485 U.S. 65, 108 S.Ct. 1130, 99 L.Ed.2d 289 (1988), the issue before this Court was whether a postjudgment "motion for costs constitutes a Rule 59 motion and thereby renders ineffective a notice of appeal filed prior to the disposition of that motion." *Id.* at 266, 108 S.Ct. at 1130. The postjudgment motion was entitled "Motion to Alter or Amend Judgment," and expressly invoked Rule 59; but it sought the assessment of costs. Notwithstanding its title and purported basis, the postjudgment motion for costs was not a Rule 59 motion. It affected neither the notice of appeal, nor the jurisdiction of the court of appeals.

> [A] motion for costs filed pursuant to Rule 54(d) does not seek "to alter or amend the judgment" within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply. . . . Respondents' inaccurate designation of their costs request as a Rule 59(e) motion cannot change this fact.

While the district court's order granting the Florida attorney general's motion imposed both obligations exclusively on Petitioner Dean, it did nothing – nor was it required to do anything – to reconsider the substantive merits of its original judgment, that the adult-entertainment ordinance under which Respondent Redner had been prosecuted and convicted was unconstitutional, and a writ of habeas corpus should be issued on his behalf.

485 U.S. at 268-69, 108 S.Ct. at 1132. "Such a motion therefore 'does not imply a change in the judgment, but merely seeks what is due *because* of the judgment' ": a "postjudgment motion for costs similarly [seeks] only what was due *because* of the judgment." *Id.* at 268, 108 S.Ct. at 1131 (emphasis in original).

> Assessment of such costs does not involve reconsideration of any aspect of the decision on the merits. Under Rule 54(d), the "prevailing party" automatically is entitled to costs "unless the court otherwise directs." Indeed, the Rule contemplates that applications for costs will be presented in the first instance not to the court but to the clerk; *a district judge need not take up the issue at all unless the losing party makes a timely motion for judicial review.* Fed. R. Civ. P. 54(d) ("on motions served within five days [after the clerk's taxing of costs], the action of the clerk may be reviewed by the court"). . . . A sharp distinction between the judgment on the merits and an award of costs under Rule 54(d) also is evident in Rule 58's instruction that "[e]ntry of the judgment shall not be delayed for the taxing of costs." Thus it is apparent that the Rules "attemp[t] to divorce the process of entering judgment from that of determining and assessing the costs."

Id., 108 S.Ct. at 1131-32 (emphasis added), quoting 10 C. Wright & A. Miller, Federal Practice and Procedure § 2679.

The Ninth Circuit, in *Durham v. Kelly*, 810 F.2d 1500 (9th Cir. 1987), had earlier adopted "the rule that a motion to alter or amend a judgment to award costs does

not come within Rule 59(e)."[10] *Id.* at 1503. The plaintiffs had filed notices of appeal directly and timely after the district court had entered judgment against them. One of the plaintiff's had filed a motion for an order amending the judgment to award taxable costs, before the notices of appeal were filed. The motion, which "provided that it was 'based on Rule 54(d)[11] and 59(e),' " was granted by the district court more than three months after the notices of appeal had been filed.

The threshold issue for the court of appeals was whether the notices of appeal were effective. *Id.* at 1502. "[The defendants-a]ppellees contend[ed] that since no further notice of appeal was filed in this matter, the court has no jurisdiction to consider these appeals." *Id.* The court ruled that

> [T]he provisions of Rule 4(a)(4) which render ineffective a notice of appeal filed during the

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[10] Likewise, the court in *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), antedated this Court's decisions in *Budinich v. Becton Dickinson & Co.*, *supra*, and *Buchanan v. Stanships, Inc.*, *supra*, when it held that, to the extent a postjudgment motion seeks to assess costs, it is not a Rule 59(e) motion directed to correcting errors of substantive law in the judgment. *Id.* at 1247.

[11] Fed. R. Civ. P. 54(d) states:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies, shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motions served within five days thereafter, the action of the clerk may be reviewed by the court.

> pendency of a motion to alter or amend a judgment are inapplicable with respect to a request for reconsideration concerning costs. . . . Because [the] request [by one of the plaintiffs] for a reconsideration of the order regarding costs was collateral to the judgment awarding damages on his claim, [the plaintiffs] were not required to file new notices of appeal. We have jurisdiction over these appeals.

Id. at 1503.[12] "The fact that appellants labeled their motion as a Rule 59(e) motion is not dispositive; [t]he

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[12] The Ninth Circuit was "persuaded by the analysis," *id.*, in an even earlier decision from the Eleventh Circuit, *Lucas v. Florida Power & Light Co.*, 729 F.2d 1300 (11th Cir. 1984), where that court had held that "[a] motion respecting costs is not a motion to alter or amend a judgment under Rule 59." *Id.* at 1301.

There, the district court had entered judgment in favor of the defendant, stating that the defendant shall recover costs from the plaintiffs. The plaintiffs moved, under Rule 59(e), "to alter or amend the final judgment, with respect to the allocation of costs," but while that motion was pending, they filed a notice of appeal. *Id.* at 1300. Relying on this Court's decision in *White v. New Hampshire Dep't. of Employment Security, supra*, the Eleventh Circuit rejected the defendant's argument that, because the notice of appeal was filed while the self-styled Rule 59 motion concerning costs was pending, the notice was ineffective. *Id.* at 1301.

> Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute, and not matters collateral to the merits. A motion for costs does not seek reconsideration of substantive issues resolved in the judgment, but relates exclusively to the collateral question of what is due because of the judgment.

Id.

Even before this Court's decisions in *Budinich v. Becton-Dickinson & Co.*, and *Buchanan v. Stanships, Inc.*, the Eleventh Circuit – relying (like the Ninth Circuit in *Durham v. Kelly*) on

court will construe it . . . to be the type proper for the relief requested." *Id.*[13]

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the earlier decision in *Lucas v. Florida Power & Light Co.* – rebuffed the contention that it was without jurisdiction over the plaintiff's appeal because the defendant had filed a then-pending motion ("styled as a Rule 59 motion") for the district court to reconsider its allocation of costs.

> [The defendant's] "Rule 59" motion was not in fact a motion to alter or amend judgment. According to *Lucas v. Florida Power & Light Co.*, [*supra*], "(a) motion respecting costs is not a motion to alter or amend a judgment under Rule 59. Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute and not matters collateral to the merits." [729 F.2d] at 1301. In the present case, [the defendant's] "Rule 59" motion in fact requests the court to tax the costs of the action to the losing party. In keeping with Rule 4(a)(4) of the *Federal Rules of Appellate Procedure*, and with the *Lucas* case, [the plaintiff's] first notice of appeal is valid.

Alimenta, Inc. v. Anheuser-Busch Co., 803 F.2d 1160, 1162-63 (11th Cir. 1986). *See United States v. Real Property & Residence Located at Route 1, Box 111*, 920 F.2d 788, 791 n.4 (11th Cir. 1991) (motion to change judgment respecting costs generally not characterized as Rule 59(e) motion to alter or amend judgment).

Inexplicably, the same court, in the case at hand, construed the Florida attorney general's motion – to have the responsibility for costs and discharging Respondent Redner placed solely on Petitioner Dean – as a Rule 59(e) motion and dismissed the appeal from the district court's earlier judgment.

[13] The inaccurate labeling of a motion regarding costs, as a motion under Rule 59(e), does not change the fact that cost issues are collateral to the main cause of action, and cannot be brought under Rule 59(e). *See Buchanan v. Stanships, Inc.*, 485 U.S. at 269, 108 S.Ct. at 1132. *Cf. United States v. Dieter*, 429 U.S. 9, 97 S.Ct. 18, 50 L.Ed.2d 8 (1976) (postdismissal motion, not titled "petition for rehearing," but in substance was one, and Court construed it as such).

In *Samaad v. City of Dallas*, 922 F.2d 216 (5th Cir. 1991), the district court entered an order dismissing the plaintiffs' claims on January 12, 1990. *Id.* at 217. On January 22, 1990, the plaintiffs filed a Motion to Allocate Costs under Rule 54(d), requesting each party to bear its own costs. *Id.* On February 9, 1990, the plaintiffs appealed the January 12, 1990 judgment. *Id.* On August 6, 1990, the district court granted the plaintiffs' motion in part, and directed the allocation of costs to the various parties. *Id.*

On August 14, 1990, the plaintiffs filed a motion to enter final judgment, contending that the January 22 motion to allocate costs was a Rule 59(e) motion, so that "the court should enter another 'final judgment.' " *Id.* The district court denied that motion, stating that "it was without jurisdiction to amend the judgment by virtue of the notice of appeal filed on February 9 and that the motion to allocate costs was not a Rule 59(e) motion and hence did not vitiate the February 9 notice of appeal." *Id.*

The court of appeals initially had to determine whether the February 9 notice was the operative notice of appeal, or whether it was ineffective due to the so-called Rule 59(e) motion concerning the allocation of costs, which had been pending at the time the notice of appeal was filed. *Id.* The court held that the February 9 notice was valid and operative, *id.* at 219, because "ordinary costs and attorney's fees are treated similarly, as collateral matters, for purposes of finality." *Id.* at 218.

> It is now beyond cavil that a motion for costs is not a Rule 59 motion and hence does not render ineffective a notice of appeal filed prior to the disposition of the motion for costs. Consequently, the January 22 motion to allocate costs

> was not a Rule 59 motion and did not disturb the finality of the January 12 judgment; the February 9 notice of appeal operated to appeal the January 12 judgment and was not rendered inoperative by the pendency of the January 22 motion or by the August 6 order regarding costs.

Id.

Relying on this Court's decisions in *Buchanan v. Stanships, Inc., supra,* and *Budinich v. Becton Dickinson & Co., supra,* the court of appeals ruled that the assessment of costs did not involve reconsideration of a decision on the merits, and the "motion to allocate costs does not vitiate the notice of appeal filed after the filing of the costs motion but before a ruling thereon." *Id.*

> [T]he [Court's] opinion in *Budinich [v. Becton-Dickinson & Co., supra],* makes it plain that a motion to allocate costs is not deemed a rule 59 motion, irrespective of whether the merits award incorporates an automatic award of costs. . . .
>
> [I]n *Budinich* the Court made it patent that a motion for costs or attorney's fees is not to be deemed a Rule 59 motion, even where the cost or fee award might be viewed as an integral part of the merits.

Id. "[E]ven if, as appellants contend, a costs motion by a judgment-loser conceptually opens up the merits award where a costs motion by a judgment-winner would not, neither sort of motion can be a Rule 59 motion under *Budinich.*" *Id.* at 218.

The Third Circuit, in *Fincher v. Keller Industries, Inc.*, 905 F.2d 691 (3d Cir. 1990), followed the decisions of this Court when it ruled that a motion for costs was collateral to the judgment on the merits, and did not toll the time for filing a notice of appeal. The district court had entered a final judgment, based on a jury verdict favorable to the defendant, on January 11, 1990. On January 19, 1990, the defendant filed a motion to amend the judgment "pursuant to Rule 59(e)," to permit it to file a bill of costs. *Id.* at 691-92. The district court denied the motion on February 22, 1990, and on March 19, 1990, the plaintiffs filed their notice of appeal. *Id.* at 692.

> [The defendant] argue[d] that the appeal was untimely because the notice of appeal was filed more than thirty days after the entry of the judgment for the defendant. [The p]laintiffs contend[ed] that under the plain language of Federal Rule of Appellate Procedure 4(a)(4), when a timely motion is filed under Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment, "the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion." Therefore, according to the plaintiffs, their notice of appeal was timely because it was filed within thirty days of the district court's denial of the defendant's motion to amend to permit filing of the costs bill.

Id. The effectiveness of the appeal depended on whether or not the motion for costs was to be treated as a Rule 59(e) motion. *Id.*

The court of appeals held that the decisions of this Court in *White v. New Hampshire Dep't. of Employment*

Security, Budinich v. Becton Dickinson & Co., and *Buchanan v. Stanships, Inc.*, "are dispositive of the issue before us." *Id.* at 693. "[The defendant's] motion for costs was wholly collateral to the judgment on the merits"; and "although it was mistakenly denominated by [the defendant] as a Rule 59(e) motion, *see Buchanan [v. Stanships, Inc.]*, 485 U.S. at 269, 108 S.Ct. at 1132, it did not act to toll the time for filing a notice of appeal." *Id.*

> We are not insensitive to the fact that this result places upon the party seeking to appeal the obligation to determine for itself whether a motion denominated as a Rule 59(e) motion does in fact fall within the parameters for which that rule is designed. Nonetheless, we believe that result is mandated by the Supreme Court's decision in *Buchanan*. We recognize that in some cases there may be sufficient ambiguity in the motion itself to lead a court of appeals to hold that the motion acted as a Rule 59(e) motion, in this case it is clear that *the motion was designed for only one purpose*, i.e., *to permit the taxation of costs* on behalf of the successful party. Thus, *on its face, it was collateral to the merits*, and there was no ambiguity.

Id. at 693-94 (emphasis added).

"Motions seeking collateral relief such as costs or legal fees do not come within Rule 59"; "a dispute about costs does not affect any issue resolved by the judgment, so the appeal may proceed immediately." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 957 F.2d at 517.[14]

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[14] Even where courts of appeals (like the Seventh Circuit) have adopted a further bright-line rule, that "all motions

The case of *Crossman v. Maccoccio*, 792 F.2d 1 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1955, 95 L.Ed.2d 527 (1987), is an example of exactly the situation Petitioner Dean attempted to avoid by filing the appeal in the case at hand. The district court entered final judgment on October 9, 1985, and denied a motion for new trial on November 14, 1985. The plaintiffs' and the defendants' applications for costs (and the defendants', for attorney's fees) remained outstanding. "Apparently concluding that these matters precluded the October 9, 1985 judgments from being final ones, [the] plaintiffs did not file their notice of appeal within thirty days of the November 14, 1985 denial of their motions for a new trial." *Id.* at 2.

On December 20, 1985, the court disposed of the defendant's motion for costs and attorney's fees; and the plaintiffs filed a notice of appeal on January 17, 1986, which "purport[ed] to appeal from the October 9, 1985 judgments, the denial of plaintiffs' motion for new trial, and the December 20, 1985 order granting defendants' costs and attorney's fees under Rule 68." *Id.*

Because "the time for appealing from the October 9th judgment and November 14th order expired on December 16, 1985," *id.*, "[t]o the extent that [the] Plaintiffs seek to challenge the October 9, 1985 judgment or subsequent denial of their motions for new trial, [their] appeal is

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addressed to the judgment . . . are deemed to be Rule 59(e) motions," an explicit exception exists for "motions that kick off collateral proceedings such as a proceeding to obtain an award of costs or attorneys fees." *Lorenzen v. Employees Retirement Plan of the Sperry & Hutchinson Co.*, 896 F.2d 228, 231 (7th Cir. 1990).

dismissed. The appeal from the December 20, 1985 order may proceed." *Id.* at 3.

> The fact that the October 9, 1985 judgments did not include whatever amount of costs that Plaintiffs, as prevailing parties, would be entitled to did not preclude finality. See Fed. R. Civ. P. 58 (entry of judgment shall not be delayed for the taxing of costs). Nor would have a failure to include the amount of § 1988 attorney fees to be awarded a prevailing plaintiff prevented finality. *See White v. New Hampshire Dep't. of Employment Security*, [*supra*]; *Exchange Nat'l. Bank of Chicago v. Daniels*, 763 F.2d 286, 292 (7th Cir. 1985) ("It may be that the Court did not mean in *White* to make the decision on the merits appealable independently of the fee; the case nominally held that fees were so separate that they need not be raised under Rule 59(e) within 10 days. But the rationale leading to this result – that fees have little or nothing to do with the merits – also produces an appealable final decision, which in turn sets the outer limit within which the notice of appeal must be filed. As a result, the Court's effort in *White* to prevent forfeitures of fees . . . now can create forfeitures of challenges to the decision on the merits (if litigants do not act in the 30 days provided by Rule 4(a))").

Id. at 2-3.

Despite all of the authorities, the court of appeals, in the case at hand, ruled contrariwise. The motion of Co-Petitioner Butterworth, the Florida attorney general, requesting a reallocation of costs against Petitioner Dean alone – even if it were viewed as also seeking to shift the duty to discharge Respondent Redner – was not one that

relates to the merits of the judgment in this case. The district court was faced only with the narrow issue of reallocation of costs incurred "for the litigation." No new substantive issues were raised by this motion. It did not affect any issue resolved by the judgment.

The issues and merits, on which the district court's decision and May 18, 1992 judgment was based, and for which Petitioner Dean seeks review by his appeal in the Eleventh Circuit, are the constitutionality of the local legislation (the adult-entertainment licensing ordinance) as the lawful basis for Respondent Redner's convictions, and his entitlement to them being overturned. The substance of those issues – the merits of the petition for writ of habeas corpus – are completely independent of the question of whether costs are to be assessed, or against whom they are to be assessed.

This Court, and the courts of appeals, have consistently held that a postjudgment motion respecting costs is not a motion under Rule 59(e). A motion concerning costs seeks what is due *because* of the judgment, and does not seek an amendment or alteration of the judgment itself.

The district court's later reallocation of costs did not involve any reconsideration of the substantive issues resolved in that court's decision on the merits – which granted Respondent Redner's petition for writ of habeas corpus. That issues concerning costs are exclusively collateral, resulting because of the judgment, is further evident from Fed. R. Civ. P. 58(f), which instructs that "entry of the judgment shall not be delayed for the taxing of costs."

A notice of appeal filed while a legitimate Rule 59(e) motion is pending, is a nullity. The Florida attorney general's motion to reallocate costs was not a Rule 59(e) motion, however; and, consequently, it did not affect the time period, or the notice of appeal by Petitioner Dean, for appealing the May 18, 1993 final judgment. That appeal should have proceeded immediately and the notice of appeal should not have been dismissed.

CONCLUSION

The court of appeals' dismissal for lack of jurisdiction, – of Petitioner Dean's appeal from the district court's May 18, 1992 judgment (granting the petition for writ of habeas corpus by Respondent Redner), – because the court of appeals construed the Florida attorney general's motion to be a Rule 59(e) motion, was contrary to applicable decisions of this Court (in *Osterneck v. Ernst & Whinney, supra; White v. New Hampshire Dep't. of Employment Security, supra; Budinich v. Becton Dickinson & Co., supra; Buchanan v. Stanships, Inc., supra*), and of other United States courts of appeals.

A writ of certiorari should be issued to the United States Court of Appeals for the Eleventh Circuit, reversing its order of dismissal of the appeal filed June 17, 1992 from the district court's May 18, 1992 judgment.

Respectfully submitted,

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APPENDIX A

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JOSEPH RICHARD REDNER,

Petitioner,

V.

CHARLES S. DEAN, Sheriff of Citrus County, FL, and ROBERT BUTTERWORTH, Attorney General of the State of Florida,

Respondents.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 91-90-Civ-Oc-10

— **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

— **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's Order filed this date, the Magistrate Judge's Report & Recommendation is adopted and confirmed as the decision of the Court.

Petitioner's Petition for Writ of Habeas Corpus is GRANTED and Respondents are directed to forthwith take all action necessary to set aside the Petitioner's judgment of conviction and to release and discharge him from any further restraint of any kind or consequence of

that judgment. Accordingly, costs shall be assessed according to law.

May 18, 1992
Date

DAVID L. EDWARDS
Clerk

c: counsel of record

/s/ Jamie S. Fisher
(By) Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JOSEPH RICHARD REDNER,

Petitioner,

vs.

CASE NO.:
91-90-CIV-OC-10

CHARLES S. DEAN, Sheriff of Citrus County, Florida; and ROBERT BUTTERWORTH, the Attorney General of the State of Florida,

Respondents

_____/

NOTICE OF APPEAL

Notice is hereby given that Respondents, Charles S. Dean, Sheriff of Citrus County, Florida, and Robert Butterworth, Attorney General of the State of Florida, hereby appeal to the United States Court of Appeals for the Eleventh Circuit, from the judgment of the United States District Court for the Middle District of Florida, entered in this case on May 18, 1992; and from the order of the United States District Court, Middle District of Florida, entered on the same date (May 18, 1992), which adopted and confirmed the report and recommendation of the magistrate judge, all of which would grant the Petition for Writ of Habeas Corpus and issue a writ of habeas corpus to Respondents, and direct them "forthwith [to] take all action necessary to set aside the Petitioner's

judgment of conviction and to release and discharge him from any further restraint of any kind in consequence of that judgment," and to allow "costs [to] be assessed according to law."

Respectfully submitted,

/s/ Russell W. LaPeer
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Florida Bar No. 200530
Robert R. Wheeler
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Attorneys for Respondent, Charles S. Dean, Sheriff, Citrus County, Florida

/s/ David Morgan
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this Notice of Appeal has been sent to the Clerk of the United States District Court, Middle District of Florida, in Jacksonville, Florida; and a copy sent by U.S. Mail this 16th day of June, 1992, to:

Luke C. Lirot, Esquire, 2123 Northeast Coachman Road, Suite A, Post Office Box 5379, Clearwater, Florida 34625, Attorney for Petitioner.

/s/ Russell W. LaPeer
Russell W. LaPeer
Robert R. Wheeler

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JOSEPH RICHARD REDNER,

Petitioner,

v.

CASE NO.:
91-90-CIV-OC-10

CHARLES S. DEAN, Sheriff of Citrus County, Florida; and ROBERT BUTTERWORTH, the Attorney General of the State of Florida,

Respondents.
_____/

MOTION FOR RELIEF FROM JUDGMENT
MOTION TO AMEND JUDGMENT

The respondent Attorney General of the State of Florida moves, pursuant to Fed.R.Civ.P. 59(e), for relief from and the amendment of the judgment entered on May 18, 1992. Because the petitioner was convicted of a county ordinance, the state seeks to be relieved from responsibility to release the petitioner from custody as he is (or was) confined by Citrus County. The state also seeks specification in the judgment that any costs shall be assessed against Citrus County because the state's interest in the instant proceeding was peripheral.

On May 17, 1991, the state moved to delete the Attorney General as a party. The motion pointed out that the petitioner was detained in the county jail as a result of his conviction for violating Citrus County ordinances.

The motion was denied by order dated August 26, 1991. The state was not found to be a primary party. Rather, the attorney general was left a party because of his position as the principal legal officer of the state (Order, p. 2).

The state filed a limited response to the petition on September 23, 1991. The state adopted by reference the response previously filed by respondent Dean. Again, the state's limited interest was pointed out.

The judgment rendered provides in material part:

> Petitioner's Petition for Writ of Habeas Corpus is GRANTED and Respondents are directed to forthwith take all action necessary to set aside the Petitioner's judgment of conviction and to release and discharge him from any further restraint of any kind in consequence of that judgment. Accordingly, costs shall be assessed according to law.

The state of Florida did not actively participate in the prosecution of the petitioner, and had merely a tangential interest in the instant proceeding. Therefore, it is respectfully requested that the judgment be amended to place

responsibility for the petitioner's release and for costs upon Citrus County.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/ David S. Morgan
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COUNSEL FOR RESPONDENT
STATE OF FLORIDA

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Russell W. LaPeer, Esq., P.O. Box 1450, Ocala, FL 32678; and to Luke Charles Lirot, Esq., 2000 Magnolia Dr., Clearwater, FL 32624, by mail delivery on this 28th day of May, 1992.

/s/ David S. Morgan
DAVID S. MORGAN
ASSISTANT ATTORNEY GENERAL

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JOSEPH RICHARD REDNER,

Petitioner,

vs.

CASE NO.:
91-90-CIV-OC-10

CHARLES S. DEAN, Sheriff of Citrus County, Florida; and ROBERT BUTTERWORTH, the Attorney General of the State of Florida,

Respondents.
_____/

BRIEF IN OPPOSITION TO ATTORNEY GENERAL'S MOTION FOR RELIEF FROM JUDGMENT/MOTION TO AMEND JUDGMENT

Respectfully submitted,

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Attorneys for Respondent, Charles S. Dean, Sheriff, Citrus County, Florida

I. Background Facts and Proceedings

On May 18, 1992, this Court accepted the report and recommendation of the Magistrate Judge, and ordered that a writ of habeas corpus be issued on behalf of Petitioner Redner. The Court also ordered that judgment should be entered by the Clerk, which was done the same day. Both the Court's order, and the civil judgment, provided for the assessment of costs properly allowable by law.

One of the two Respondents, the Attorney General of the State of Florida, has filed a motion under Fed. R. Civ. P. 59(e) to amend the civil judgment to provide for the assessment of costs only against Respondent, Citrus County, Florida, but not against Respondent, the Florida Attorney General.

Wholly apart from whether the Court's acceptance of the views of the Magistrate Judge is correct on the merits, if the Court's civil judgment were to be upheld, any costs properly to be allowed to Petitioner are at least, and perhaps more, the responsibility of the Florida Attorney General, who is charged with the duty under Florida law to defend the interests of the State and its laws.

II. Argument

BECAUSE, UNDER FLORIDA LAW, THE FLORIDA ATTORNEY GENERAL MUST DEFEND THE STATE'S INTERESTS IN THIS HABEAS CORPUS PROCEEDING, HE IS A PROPER, ADDITIONAL RESPONDENT UNDER FEDERAL LAW, AND HIS MOTION SHOULD BE DENIED.

Article IV, Section 4, of the Florida Constitution states that the Attorney General of the State of Florida is "the

chief state legal officer" of the Executive Department and is a member of the cabinet. "His responsibilities with respect to litigation are covered in subsections (4) and (5)" of **Fla. Stat.** § 16.01. *Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir. 1983), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984). The Attorney General:

> (4) *Shall appear in and attend* to, in behalf of the State, all suits or prosecutions, civil or criminal or in equity, in which the State may be a party, *or in anywise interested*, in the Supreme Court and district courts of appeal of this State.
>
> (5) *Shall appear in and attend* to *such suits* or prosecutions *in* any other of *the courts* of this State or in any other courts of any other state or *of the United States*.

Fla. Stat. § 16.01(4) & (5) (emphasis added). "The statutory mandate to the Attorney General is not merely to appear but to 'attend to, in behalf of the state, all suits or prosecutions,' etc." *Thompson v. Wainwright*, 719 F.2d at 1500.

Although the Attorney General three times admits that the State of Florida is interested in the instant habeas corpus proceedings, he attempts to characterize that interest as "peripheral," "limited," and "tangential."[1] Under § 16.01 the fact that the state is "in anywise interested" is sufficient to trigger the Attorney General's statutory duties, so that he has been, and is, obliged to attend to this case. **Fla. Stat.** § 16.01(4), (5).

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[1] Motion for Relief from Judgment/Motion to Amend Judgment (Motion), at 1, 2.

Besides statutory duties, the Attorney General possesses the powers and duties that exist under common law. *Thompson v. Wainwright*, 714 F.2d at 1500; *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 269 (5th Cir. 1976), *cert. denied, sub nom. Standard Oil Co. of Calif. v. Fla.*, 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 192 (1976).

> The office of attorney general is older than the United States and is older than the State of Florida. As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion; the volume and variety of legal matters involving the crown and the public interest made such limited independence a practical necessity. Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.
>
> As a result, the attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law.

State ex rel. Shevin v. Exxon Corp., 526 F.2d at 268.

In *State ex rel. Landis v. S.H. Kress & Co.*, 115 Fla. 189, 155 So. 823, 827 (1934), the Florida Supreme Court stated that, "as the chief law officer of the state, it is [the] duty [of the Attorney General], in the absence of express legislative restrictions to the contrary, to exercise all such

power and authority as public interests may require from time to time."

> The attorney general's authority runs beyond responsibility to the government qua government. He is responsible to the people. "The Attorney-General is the attorney and the legal guardian of the people, or of the crown, according to the form of government." *State ex rel. Davis v. Love*, 99 Fla. 333, 126 So. 374, 376 (1930). When occasion arises "it is his duty to use means most effectual to the enforcement of the laws, and the protection of the people." *Id.* "The Attorney General is the principal law officer of the state." *Id.* 126 So. at 377.

Thompson v. Wainwright, 714 F.2d at 1500.

In light of the Attorney General's constitutional, statutory, and common law duties as the legal guardian of the people, his endeavor to escape his responsibilities and to "place responsibility for the petitioner's release and for costs upon Citrus County,"[2] where the State admittedly has interests in the instant proceeding, is highly inappropriate. The State and County share the interests expressed in § 1-5 of Citrus County Ordinance 88-05 to "protect the health, safety, morals and general welfare of the people of Citrus County, Florida." Such an interest in preserving the quality of life is neither "peripheral," "limited" nor "tangential,"[3] but is "one that must be

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[2] Motion at 2.

[3] Motion at 1, 2.

accorded high respect," and is "both important and substantial." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986).

This Court recognized, when it denied the Attorney General's motion to delete the Attorney General as a party to this case, that it is not improper under federal law to name a state's attorney general as an additional respondent: "it is clear that in many cases a state's attorney general has been made a respondent."[4]

> With respect to Respondent The Attorney General of the State of Florida, Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts, states that "the state officer having custody of the applicant shall be named as a respondent." The Rule does not say that the attorney general must be named as a respondent nor does it make him an indispensable party. However, Rule 4 further provides that if a response is required " . . . a copy of the petition and any Order shall be served by certified mail on the respondent and the attorney general of the state involved." *See also* 28 U.S.C. § 2243. Additionally, the model form for 2254 applications, contained in the Appendix of Forms to the rules, names the Attorney General

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[4] August 26, 1991 Order at 2; *See, e.g. Oyola v. Bowers*, 947 F.2d 928 (11th Cir. 1991) (Attorney General of Ga.); *Collier v. Jones*, 910 F.2d 770 (11th Cir. 1990) (Attorney General of Ala.); *Jones v. Dugger*, 888 F.2d 1340 (11th Cir. 1989) (Attorney General of Fla.); *Langelier v. Coleman*, 861 F.2d 1508 (11th Cir. 1988); *Smith v. White*, 719 F.2d 390 (11th Cir. 1983) (Attorney General of Ala.); *Schultz v. Wainwright*, 701 F.2d 900 (11th Cir. 1983) (Attorney General of Fla.); *Carrizales v. Wainwright*, 699 F.2d 1053 (11th Cir. 1983) (Same).

as an additional Respondent. This is done as a courtesy to the Attorney General, and such notice appears to be a standardized requirement in order that the highest ranking state legal authority be aware of the proceeding. *See* 28 U.S.C. § 2252.[5]

III. CONCLUSION

This Court should deny the Attorney General's motion seeking to place responsibility for Petitioner's release and for costs upon Citrus County. The State of Florida has important and substantial interests in this case, and the Attorney General, as the principal legal officer of the State, has the constitutional, statutory, and common law duty to defend those interests.

The interests of the State, in upholding the constitutionality of its laws, and in the uniformity of enforcement of its laws, are involved in this habeas corpus case. They are not interests peculiarly local to Citrus County. The Attorney General is mandated by statute, and obliged by his powers and duties under the common law, to "attend to" and defend those interests.

The suggestion that he can have a peripheral or tangential relationship to those interests is contradictory to the nature of his office and the scope of his responsibilities. It is appropriate under federal law to name a state's attorney general as an additional respondent to a petition for writ of habeas corpus that attacks the constitutionality of legislation in the state.

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[5] August 26, 1991 order, at 1, 2.

The effort to have the civil judgment amended to relieve the Attorney General of responsibility for allowable costs, if the Court's ruling should prevail, is but an attempt to enjoy the discretion and authority of his role, but to evade the responsibilities of it. The motion should be denied.

Respectfully submitted,

/s/ Russell W. LaPeer
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Florida Bar No. 200530
Robert R. Wheeler
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Attorneys for Respondent, Charles S. Dean, Sheriff, Citrus County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this Brief in Opposition to Attorney General's Motion for Relief from Judgment/Motion to Amend Judgment has been sent to the Clerk of the United States District Court, Middle District of Florida, in Jacksonville, Florida; and a copy sent by U.S. Mail this 15th day of June, 1992, to:

Luke C. Lirot, Esquire, 2123 Northeast Coachman Road, Suite A, Post Office Box 5379, Clearwater, Florida 34625, Attorney for Petitioner; and

David S. Morgan, Assistant Attorney General, 210 Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, Attorney for Additional Respondent.

/s/ Russell W. LaPeer
Russell W. LaPeer
Robert R. Wheeler

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CHARLES S. DEAN, Sheriff of Citrus County, Florida; and ROBERT BUTTERWORTH, Attorney General of the State of Florida,

Appellants,

v.

JOSEPH RICHARD REDNER,

Appellee.

C.A. CASE NO. _____
M.D.Fla. No. 91-90-Civ-Oc-10

NOTICE OF PREMATURE FILING OF NOTICE OF APPEAL

Appellant state of Florida gives notice that the notice of appeal was filed prematurely by the appellant Citrus County, and as a result has no effect. The state has motions for relief from judgment / to amend judgment, filed pursuant to Federal Rule of Civil Procedure 59(e), pending in the middle district court. Federal Rule of Appellate Procedure 4(a)(4) provides in material part that "[a] notice of appeal filed before the disposition of [such a] motion[ ] shall have no effect."

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/ David S. Morgan
DAVID S. MORGAN
ASSISTANT ATTORNEY GENERAL

Florida Bar No. 651265
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR APPELLANT
STATE OF FLORIDA

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Clerk of the Middle District Court, P.O. Box 53558, 311 Monroe St., Rm. 110, Jacksonville, FL 32201; Luke C. Lirot, Esq., P.O. Box 5379, Clearwater, FL 34625; Russell W. LaPeer, Esq., P.O. Box 1450, Ocala, FL 32678, by mail delivery on this 22nd day of June, 1992.

,'s/ David S. Morgan
DAVID S. MORGAN
ASSISTANT ATTORNEY
GENERAL

APPENDIX F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case and Names of Parties

August 19, 1992

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 92-2615 Redner v. Dean
DC DKT NO.: 91-00900-CIV-OC-10

NOTICE OF APPEAL FILED: June 17, 1992

The referenced case has been docketed in this court. After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed.R.App.P. 26.1 and the corresponding circuit rules. Requests for extensions of time to file a response may not be entertained. Please do not address any other issues on appeal at this time.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). If a transcript has been ordered [*See* Fed.R.App.P. 10(b)], it is appellant's responsibility to make arrangements with the court reporter to postpone the preparation of the transcript pending a determination of the jurisdictional issues, if this is desired. The parties will be advised by this office of the court's determination and of any further actions which may be required.

Counsel participating in this appeal should complete and return the enclosed appearance form within fourteen (14) days. [11th Cir. R. 46-1]. Only counsel who enter an appearance will be noted on the docket. Persons appearing pro se need not file an appearance form.

Sincerely,
/s/ Miguel J. Cortez
MIGUEL J. CORTEZ, Clerk

Reply To: Linda Sailors (404) 331-3846

c: District Court Clerk

No. 92-2615

JURISDICTIONAL QUESTION(S)

Whether appellant Dean's notice of appeal was ineffective because it was filed while respondent Butterworth's motion for relief from judgment was still pending in the district court? Fed.R.App.P. 4(a)(4); *Griggs v. Provident*

Consumer Discount Co., 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225, 229 1984).

APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JOSEPH RICHARD REDNER,

Petitioner,

-vs-

CASE NO.
91-90-Civ-Oc-10

CHARLES S. DEAN, Sheriff of Citrus County, Florida, and ROBERT BUTTERWORTH, Attorney General of the State of Florida,

Respondents.
_____/

ORDER

By Order (Doc. 36) entered 18 May 1992 Citrus County Ordinance 88-05 was found to be unconstitutional. The Order granted the Petitioner a writ of habeas corpus and directed the Respondents "to set aside [his] judgment of conviction and to release him from any further restraint of any kind in consequence of that judgment." Respondent Dean now moves (Doc. 43) for a stay of the Order pending his appeal. The memorandum (Doc. 44) accompanying the motion states that the Petitioner is no longer in custody. The Petitioner in his response (Doc. 48) to the motion states that he has completed his sentence. Accordingly, Respondent Dean in essence seeks a stay of the finding that Ordinance 88-05 is unconstitutional. The motion is due to be denied.

Respondent Butterworth moves (Doc. 38) for relief from judgment. The judgment (Doc. 37) is directed to

both Respondents and makes both Respondents responsible for costs. Because Respondent Butterworth's role in the case is peripheral and because the Court has already noted (Doc. 22) that he was made a party as a means of insuring his awareness of the case, the motion is due to be granted.

Respondent Dean has moved (Doc. 47) for review of the Clerk's taxation of costs. The Petitioner has responded (Docs. 49 & 50) to the motion by reducing costs by $21.25 and by providing further documentation and itemization. Accordingly, the parties are in agreement that the total costs are $181.10.

Upon due consideration:

1. Respondent Dean's motion (Doc. 43) for a stay pending appeal of the order granting a writ of habeas corpus is DENIED.

2. Respondent Butterworth's motion (Doc. 38) for relief from judgment is GRANTED and the Clerk is directed to amend the judgment to relieve Respondent Butterworth from responsibility for costs and of setting aside Petitioner's judgment of conviction.

3. Respondent Dean's motion (Doc. 47) for review of the Clerk's taxation of costs is GRANTED to the extent that the Clerk's bill of costs (Doc. 46) is hereby amended by the deletion of the $21.15 for "fees for exemplification and copies of papers necessarily obtained for use in the case", making a new total of $181.10.

4. Respondent Dean's request (Doc. 42) for judicial notice of the affidavits of Clarissa Smith and James A. Peterson is GRANTED.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this 15th day of September, 1992

/s/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

Copy to counsel of record

APPENDIX H

AO 450 (Rev. 5/85) Judgment in a Civil Case

==========

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

OCALA DIVISION

AMENDED
JUDGMENT IN A CIVIL CASE

JOSEPH RICHARD REDNER,

V.

CHARLES S. DEAN, etc., et al.,

CASE NUMBER: 91-90-Civ-Oc-10

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's order, filed on September 15, 1992, IT IS ORDERED THAT:

The Judgment entered on May 18, 1992 is *amended* to relieve Respondent ROBERT BUTTERWORTH, from responsibility for costs and of setting aside petitioner's judgment of conviction. ----------

September 15, 1992
Date

DAVID L. EDWARDS
Clerk

Copies to:
Counsel of record

/s/ Evelyn Stout
(By) Deputy Clerk

APPENDIX I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CHARLES S. DEAN, Sheriff
of Citrus County, Florida,

Appellant

vs.

CASE NO:
91-90-CIV-OC-10

ROBERT BUTTERWORTH, the
Attorney General of the State of
Florida and JOSEPH RICHARD
REDNER,

Appellees.
_____/

NOTICE OF APPEAL

Notice is hereby given that Respondent, Charles S. Dean, Sheriff of Citrus County, Florida, hereby appeals to the United States Court of Appeals for the Eleventh Circuit, from the order of the United States District Court, Middle District of Florida, entered in this case on September 15, 1992; and from the amended judgment of the United States District Court for the Middle District of Florida, entered on the same date (September 15, 1992), which order and judgment "relieve Respondent Butterworth from responsibility for costs and of setting aside Petitioner's judgment of conviction."

Respectfully submitted,

/s/ Russell W. LaPeer
Russell W. LaPeer
Florida Bar No. 200530
Robert R. Wheeler
Florida Bar No. 796409

PATTILLO & McKEEVER, P.A.
Post Office Box 1450
Ocala, Florida 34478-1450
(904) 732-2255

Attorneys for Respondent,
Charles S. Dean, Sheriff,
Citrus County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this Notice of Appeal has been sent to the Clerk of the United States District Court, Middle District of Florida, in Jacksonville, Florida; and a copy sent by U.S. Mail this 9 day of October, 1992, to:

Luke C. Lirot, Esquire, 2000 North Magnolia Drive, Clearwater, Florida 34624, Attorney for Petitioner; and

David S. Morgan, Esquire, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, Attorney for Additional Respondent.

/s/ Russell W. LaPeer
Russell W. LaPeer
Robert R. Wheeler

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-2615

JOSEPH RICHARD REDNER,

Petitioner-Appellee,

versus

CHARLES S. DEAN, Sheriff of
Citrus County, Florida;
ROBERT A. BUTTERWORTH,

Respondents-Appellants

NO. 92-3033

JOSEPH RICHARD REDNER,

Petitioner-Appellee,

versus

CHARLES S. DEAN, Sheriff of
Citrus County, Florida,

Respondent-Appellant,

ROBERT A. BUTTERWORTH,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

Before KRAVITCH, BIRTH and DUBINA, Circuit Judges.

BY THE COURT:

Respondent Butterworth's post-judgment motion sought to be relieved from responsibility for releasing petitioner Redner and from any liability for costs in this action. Accordingly, it is properly construed as a Fed.R.Civ.P. 59(e) motion which tolled the time for filing a notice of appeal and rendered the appeal in case No. 92-2615 premature and ineffective. Fed.R.App.P. 4(a)(4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982) (*per curiam*). Accordingly, that appeal is DISMISSED for lack of jurisdiction. This dismissal does not affect respondent Dean's second appeal filed following the district court's disposition of that motion, our case No. 92-3033.

APPENDIX K

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

CHARLES S. DEAN, SHERIFF,
CITRUS COUNTY, FLORIDA,
Applicant,

v.

ROBERT A. BUTTERWORTH and
JOSEPH RICHARD REDNER,

Respondents.
_____/

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Russell W. LaPeer
Counsel of Record
and
Robert R. Wheeler

Pattillo & McKeever, P.A.
Post Office Box 1450
Ocala, Florida 34478-1450
(904) 732-2255

Attorneys for Applicant, Charles S. Dean, Sheriff, Citrus County, Florida

Pursuant to 28 U.S.C. § 2101(c) and Rules of the Supreme Court of the United States 13.2, 13.6, 22, & 30.2, Charles S. Dean, the Sheriff of Citrus County, Florida, hereby applies to the Honorable Anthony M. Kennedy, Justice of this Court, as the Circuit Justice who is allotted to the United States Court of Appeals for the Eleventh

Circuit, for an extension of sixty days time within which to file in this Court a petition for writ of certiorari addressed to the United States Court of Appeals for the Eleventh Circuit.

The grounds constituting good cause for extending the time by sixty days for filing a petition of writ of certiorari are set forth as follows:

1. This matter stems from a habeas corpus proceeding in the United States District Court, Middle District of Florida, brought by Respondent, Joseph Richard Redner.

2. On May 18, 1992, the district court entered a final judgment, granting a petition for writ of habeas corpus, and directing that "the necessary steps [be taken] to set aside [Respondent Redner's] conviction and to discharge him from any restraint."

3. Thereafter, on May 20, 1992, Respondent Butterworth, the Florida Attorney General, filed a motion with the district court entitled "Motion for Relief from Judgment, Motion to Amend Judgment," concerning the May 18, 1992 judgment, which requested that the responsibility of setting aside the conviction and the assessment of costs in connection therewith should be imposed solely on Applicant, Sheriff Dean.

4. While that motion was pending, and because of the uncertainty concerning the nature of the motion, Applicant, Sheriff Dean, filed a notice of appeal on June 17, 1992, from the May 18, 1992 civil judgment.

5. The United States Court of Appeals for the Eleventh Circuit then requested the parties to submit briefs on the question of appellate review jurisdiction, in light of

the motion by Respondent Butterworth, the Florida Attorney General, concerning the May 18, 1992 judgment.

6. On September 8, 1992, Applicant, Charles S. Dean, as Appellant, filed a response to the jurisdictional question raised by the Court of Appeals for the Eleventh Circuit.

a. In that response, Applicant Dean (as Appellant) relied on decisions from this Court to argue that the court of appeals possessed appellate jurisdiction, notwithstanding the motion of Respondent Butterworth, for relief from judgment/to amend judgement, because that motion was in reality concerned with a collateral matter – the taxation of costs – and not the underlying merits of the May 18, 1992 judgment.

b. Specifically, Applicant Dean relied on the Court's decisions in *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174-78, 109 S.Ct. 987, 990-92, 103 L.Ed.2d 146 (1989) (motion for discretionary prejudgment interest did not raise issues wholly collateral to, and separate from, decision on merits of judgment); *White v. New Hampshire Dep't. of Employment Security*, 455 U.S. 445, 451-52, 102 S.Ct. 1162, 1166-67, 71 L.Ed.2d 325 (1982) (postjudgment motion for attorney's fees collateral to, and not affecting merits or finality of judgment on appeal); *Budnich v. Becton Dickenson & Co.*, 486 U.S. 196, 199-203, 108 S.Ct. 1717, 1720-22, 100 L.Ed.2d 178 (1988) (same); *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268-69, 108 S.Ct. 1130, 1132, 99 L.Ed.2d 289 (1988) (postjudgment motion for costs under Rule 54(d) is not Rule 59(e) motion, and affects neither finality of judgment, validity of notice of appeal, or appellate jurisdiction).

7. In the meanwhile, on September 15, 1992, the district court granted the motion of Respondent Butterworth, and entered an amended judgment (amending the final judgment of May 18, 1992), "to relieve Respondent Butterworth from the responsibility for costs and of setting aside [Respondent Redner's] judgment of conviction[s]."

8. On October 13, 1992, Applicant, Sheriff Dean, filed a notice of appeal from the September 15, 1992 amended civil judgment entered by the district court.

9. Eventually, on January 20, 1993, the court of appeals ruled that Respondent Butterworth's post-judgment motion "is properly construed as a Fed. R. Civ. P. 59(e) motion which tolled the time for filing a notice of appeal and rendered the appeal [from the May 18, 1992 judgment] premature and ineffective."

10. The court of appeals dismissed the appeal from the May 18, 1992 judgment "for lack of jurisdiction," but expressly declared that the "dismissal does not affect [Applicant] Dean's second appeal filed following the district court's disposition of that motion."

11. In that "second appeal," Applicant Dean, as Appellant, has filed his brief addressing the merits of the amended judgment, entered September 15, 1992, which includes the issues presented in the district court's initial decision on the merits, as well as the additional issue presented in the district court's amended judgment.

12. Actions taken by Respondent Redner, in the district court; and statements made by Respondent Butterworth's counsel, present the reasonable expectation that

Respondents, as Appellees in the court of appeals, will challenge the right of Applicant Dean, as Appellant, to appeal the substantive merits of the district court's ruling.

a. Respondent Redner has contended, in the district court, that the second (October 13, 1992) notice of appeal by Applicant Dean waived any right to present on appeal the substantive merits of the district court's ruling, as first contained in its May 18, 1992 judgment.

b. Applicant Dean has countered, in the district court, that if the court of appeals correctly construed the May 20, 1992 motion of Respondent Butterworth as a Rule 59(e) motion, invalidating the notice of appeal and precluding appellate jurisdiction over the district court's May 18, 1992 judgment; then that judgment was no longer a final judgment, but became final only in, and when, the amended judgment was entered on September 15, 1992, so as to be appealable only by means of the October 13, 1992 (second) notice of appeal.

13. Briefs, or motions, by Respondents Redner and Butterworth, as Appellees in the court of appeals, are not due before April 28, 1993; but a Petition for Writ of Certiorari, seeking review of the court of appeals' January 20, 1993 order of dismissal, must be filed no later than April 20, 1993, unless extended in accordance with 28 U.S.C. § 2101(c) and Rule 13 of the rules of this Court.

14. If the court of appeals turns aside the expected challenge to Applicant Dean's appeal on the substantive merits of the district court's ruling, the potential need for

filing a petition for writ of habeas corpus in this Court will never come to fruition.

15. On the other hand, if the court of appeals were to sustain such a challenge to Applicant Dean's right to appeal the substantive merits of the district court's ruling (by the second, October 13, 1992, notice of appeal) then the inconsistency of the court of appeals would require an endeavor to obtain clarification and rectification from this Court, of the court of appeals' January 20, 1993 order that construed Respondent Butterworth's motion as a Rule 59(e) motion, and dismissed the first appeal for lack of jurisdiction.

16. Under Rules 13.2 and 22, Justice Kennedy has the power "to grant case-by-case extensions" of time for filing petitions for writ of certiorari "for cause shown." *Madden v. Texas*, ___ U.S. ___, ___, 111 S.Ct. 902, 905 (1991) (Scalia, J., as Circuit Justice).

17. Rule 13.6 admonishes that "[a]n application to extend the time to file a petition for writ of certiorari is not favored"; and "[a]n extension of this time limit obviously should be granted only in those exceptional circumstances in which the policy behind the general rule is proper to be subordinated to a more compelling policy." *Brody v. United States*, 353 U.S. 655, 77 S.Ct. 910, 911 (1957) (Frankfurter, J., as Circuit Justice).

18. This is not a case where unnecessary delay, or insubstantial personal reasons, are offered as cause for extending the time for a petition for writ of certiorari. *See, e.g., Madden v. Texas*, ___ U.S. at ___, 111 S.Ct. at 903-05 (inexperience with filing petition for writ of certiorari and need of counsel to consult with other counsel); *Kleen*

v. INS, 479 U.S. 1308, 107 S.Ct. 484, 93 L.Ed.2d 566 (1986) (desire of counsel for additional time for research and preparation); *Brody v. United States*, 353 U.S. at 655, 77 S.Ct. at 911 (counsel's busy schedule and desire for more time to do research); *Carter v. United States*, ___ U.S. ___, 75 S.Ct. 911 (1955) (counsel's active engagement in criminal practice); *Goldman v. Fogerty*, 348 U.S. ___, 75 S.Ct. 257, 258 (1954) (needless delay since application set forth substantially same argument as petition for writ of certiorari should contain); *Knickerbocker Printing Corp. v. United States*, 348 U.S. ___, 75 S.Ct. 212-13 (1954) (active, busy schedule of counsel in lower courts).

19. This application is a protective jurisprudential step.

a. It will protect the rights of Appellant Dean (1) to seek a writ of certiorari from this Court if necessary, to correct the court of appeals' January, 1993 order, and (2) to preserve his right to appeal from the district court's substantive ruling on the merits.

b. It will also protect this Court from a petition for writ of certiorari that otherwise must be filed by April 20, 1993, but which eventually may prove to be unnecessary.

20. The extension of time for filing a petition for writ of certiorari in these circumstances is sound jurisprudence and an effective use of judicial resources.

21. If, as expected, the court of appeals upholds Applicant Dean's right to appeal the substantive merits of the district court's ruling, from the amended judgment of September 15, 1992, that will be consistent with the court of appeals' January 20, 1993 order dismissing the first

appeal and construing Respondent Butterworth's motion as a Rule 59(e) motion.

a. It will reject the anticipated challenge from Respondents, and confirm Applicant Dean's right to proceed on appeal in the court of appeals.

b. It will also make unnecessary, and prevent from coming to realization, any need to petition this Court for a writ of certiorari.

Accordingly, because good cause is shown by the reasons set forth above, the Honorable Anthony M. Kennedy, Justice of this Court, should grant an extension of sixty days within which Applicant, Charles S. Dean, Sheriff, Citrus County, Florida, may file a petition for writ of certiorari addressed to the United States Court of Appeals for the Eleventh Circuit, in this Court.

Respectfully submitted,

/s/ Russell W. LaPeer
Russell W. LaPeer
Counsel of Record
and
Robert R. Wheeler
Pattillo & McKeever, P.A.
Post Office Box 1450
Ocala, Florida 34478-1450
(904) 732-2255

Attorneys for Applicant,
Charles S. Dean, Sheriff,
Citrus County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and two copies of this Application for Extension of Time to File Petition for Writ of Certiorari have been sent to the Supreme Court of the United States; and copies have been served by U.S. Mail, on this 8th day of April, 1993, upon:

Luke C. Lirot, Esquire, 2000 Magnolia Drive, Clearwater, Florida 34624, Attorney for Respondent, Joseph Richard Redner; and

Rebecca Roark Wall, Esquire, Assistant Attorney General, 210 Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, Attorney for Respondent, Robert Butterworth, Attorney General of State of Florida.

/s/ Russell W. LaPeer
Russell W. LaPeer
Robert R. Wheeler

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

CHARLES S. DEAN, SHERIFF,
CITRUS COUNTY, FLORIDA,

Applicant,

v.

ROBERT A. BUTTERWORTH and
JOSEPH RICHARD REDNER,

Respondents.
_____/

AFFIDAVIT OF SERVICE OF APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

STATE OF FLORIDA

COUNTY OF MARION

Before me, the undersigned authority, personally appeared Russell W. LaPeer, who, having been duly sworn, avers as follows:

1. I make this affidavit from my own personal knowledge.

2. I am an attorney, licensed to practice law in the State of Florida, and a member of the Bars of the United States District Court for the Middle District of Florida, the United States Eleventh Circuit Court of Appeals, and the United States Supreme Court.

3. I am counsel for the Applicant, Charles S. Dean, Sheriff of Citrus County, Florida (Respondent/Appellant in the United States Eleventh Circuit Court of Appeals, Case No. 92-2615) on whose behalf this Application for Extension of Time to File Petition for Writ of Certiorari is filed.

4. An original and two copies of the Application for Extension of Time to File Petition for Writ of Certiorari have been sent this 8th day of April, 1993, by overnight, express courier (Federal Express) to the Clerk of the United States Supreme Court, to arrive on Friday, April 9, 1993.

5. In accordance with United States Supreme Court Rule 29.5(c), all parties to this action, through their counsel, have been served with a copy of this Application for

Extension of Time to File Petition for Writ of Certiorari, sent by U.S. mail this 8th day of April, 1993, to:

a. Luke C. Lirot, Esquire, 2000 Magnolia Drive, Clearwater, Florida 34624, (813) 874-2030, Counsel for Respondent, Joseph Richard Redner;

b. Rebecca Roark Wall, Esquire, Assistant Attorney General, 210 Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, (904) 238-4990, Counsel for Respondent, Robert A. Butterworth, Attorney General of the State of Florida.

6. I declare under penalty of perjury that the foregoing is true and correct. Executed on April 8, 1993.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Russell W. LaPeer
Russell W. LaPeer

STATE OF FLORIDA)

COUNTY OF MARION)

The foregoing Affidavit of Service of Application for Extension of Time to File Petition for Writ of Certiorari was acknowledged before me this 8 day of April, 1993, by Russell W. LaPeer, who is personally known to me ~~(or has~~

~~produced ___ as identification)~~ and who ~~did~~ (did not) take an oath.

(SEAL)

/s/ Adrienne C. McAlevey
Signature of Notary

Adrienne C. McAlevey
Print, Stamp or Type
Name of Notary

_____
Commission Number

APPENDIX L

SUPREME COURT OF THE UNITED STATES

No.

A-771

Charles S. Dean, Sheriff of Citrus County, Florida,

Petitioner

v.

Robert A. Butterworth, Attorney General of Florida, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 15, 1993.

/s/ Anthony M. Kennedy
Associate Justice of the
Supreme Court of the
United States

Dated this 12th
day of April, 1993.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

NOTIFICATION LIST

Mr. Russell W. LaPeer
Pattillo & McKeever, P.A.
Post Office Box 1450
Ocala, FL 34478-1450

Ms. Rebecca Roark Wall
Assistant Attorney General
210 Palmetto Avenue, Suite 447
Daytona Beach, FL 32114

Mr. Luke C. Lirot
2000 Magnolia Drive
Clearwater, FL 34624

Miguel J. Cortez Jr.
United States Court of Appeals for
the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

April 12, 1993

Mr. Russell W. LaPeer
Pattillo & McKeever, P.A.
Post Office Box 1450
Ocala, FL 34478-1450

Re: Charles S. Dean, Sheriff of Citrus County, Florida,
v. Robert A. Butterworth, Attorney General of Florida, et al.
Application No. A-771

Dear Mr. LaPeer:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on April 12, 1993, signed an order extending the time to and including June 15, 1993.

A copy of the Justice's order is enclosed.

Very truly yours,

WILLIAM K. SUTER, Clerk

By /s/ Jeffrey D. Atkins
Jeffrey D. Atkins
Assistant Clerk

NOTE – FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHARLES S. DEAN, Sheriff
of CITRUS COUNTY, Florida

Appellant

v.

ROBERT BUTTERWORTH, the
Attorney General of the
State of Florida,
and
JOSEPH RICHARD REDNER,

Appellees

_____/

No. 92-3033

(Middle District
of Florida
No. 91-90-Civ-
OC-10)

APPELLEE REDNER'S MOTION TO STRIKE OR DISMISS ISSUE I IN APPELLANT CITRUS COUNTY'S INITIAL BRIEF AND MOTION FOR AN ENLARGEMENT OF TIME IN WHICH TO FILE A REPLY BRIEF, IF NECESSARY AND MEMORANDUM OF LAW

COMES NOW Appellee, JOSEPH RICHARD REDNER (hereinafter "REDNER"), by and through the undersigned attorney, pursuant to Rules 26(b) and 27, Fed.R.App.P., and respectfully moves this Honorable Court to Dismiss or Strike Issue I and the related Statement of Case, Summary of Argument, and Argument in Appellant's Initial Brief, and also moves for an Enlargement of Time in which Appellee REDNER may, if necessary, file a reply brief, and as grounds wherefore would show:

A. DISMISSAL OR STRIKING

1. REDNER timely and properly filed a Petition for a Writ of *Habeas Corpus* in the District Court, challenging his conviction and detention under Citrus County Ordinance 88-05.

2. Pursuant to 28 U.S.C. § 2241 *et seq.*, Respondents to the Petition for a Writ of *Habeas Corpus* were Charles Dean, Citrus County Sheriff, and Robert Butterworth, as Attorney General of the State of Florida.

3. After extensive proceedings before the District Court, not germane hereto, on March 4, 1992, the Magistrate Judge issued a Report and Recommendation, recommending that the Writ of *Habeas Corpus* be issued.

4. On May 18, 1992, the District Court adopted and confirmed the Report and Recommendation of the Magistrate Judge.

5. On June 1, 1992, Respondent BUTTERWORTH filed a Motion for Relief from Judgment, which Motion precluded the timely appeal of the Order of May 18, 1992.

6. Notwithstanding BUTTERWORTH's Motion for Relief from Judgment, on June 17, 1992, Appellant DEAN filed a Notice of Appeal against the issuance of the Writ of *Habeas Corpus*, which Notice of Appeal became Case No. 92-2615 before this Honorable Court. A copy of said Notice of Appeal is found as Exhibit A, attached hereto and made a part hereof by reference.

7. On September 15, 1992, the Court entered an order granting BUTTERWORTH's Motion for Relief from Judgment.

8. Appellant DEAN filed no new Notice of Appeal of the May 18, 1992 Order, but did file a Notice of Appeal of the Order granting BUTTERWORTH Relief from Judgment.

9. The Notice of Appeal which became Case 92-2615 was filed prior to the final determination of the action by the District Court, and no Notice of Appeal of the substantive decision of the District Court was filed within 30 days of the final disposition of the case by the District Court.

10. In contrast, the secondary appeal in the instant case (Case No. 92-3033) is based on a timely Notice of Appeal, (Exhibit B, attached hereto and made a part hereof by reference,) but said Notice only appeals the exoneration of BUTTERWORTH (primarily from the issue of costs,) and makes no mention of the primary order granting the Writ of *Habeas Corpus*.

11. Appellant DEAN moved to consolidate this procedural Appeal with the Appeal on the substantive part of the District Court's adjudication of the Writ of *Habeas Corpus*, but said Motion was denied, and DEAN's appeal of the substantive issue of the granting of the Writ of *Habeas Corpus*, was dismissed. (Exhibit C, attached hereto and made a part hereof by reference.)

12. DEAN has since petitioned the Supreme Court of the United States for an enlargement of time in which to seek Certiorari Review of the Order Dismissing Case No. 91-2615, Exhibit D, attached hereto and made a part hereof by reference.

13. It is immaterial to REDNER as to which party is responsible to REDNER for his taxable costs (or, for that matter, for damages in District Court Case 88-50).

14. REDNER does not wish to become involved in the internecine dispute between CITRUS COUNTY and BUTTERWORTH, however, REDNER concurs with the finding of the District Court that the Attorney General's participation and liability in this action is minimal since that office had no role whatsoever in the underlying facts which precipitated the instant litigation.

15. Issue I in Appellant's Initial Brief, together with the related Statement of the Case, Summary of Argument, and Argument, are nothing more than a procedurally improper attempt to revisit the substantive issues which might have been raised in Case 92-2615, had it not been dismissed.

16. Issue I in Appellant's Initial Brief, together with the related Statement of the Case, Summary of Argument, and Argument, bears no relationship whatsoever to the Notice of Appeal in this case, and attempts to present and argue issues belonging **solely and discretely** in Case 92-2615.

17. By raising and arguing Issue I in his Initial Brief, Appellant DEAN is improperly attempting to have a panel of this Court reconsider the Order Dismissing the Appeal on this Issue, and entertain matters not properly before this Court.

WHEREFORE, REDNER respectfully moves this Honorable Court to Dismiss or Strike Issue I, and the

related Statement of the Case, Summary of Argument and Argument in Appellant's Initial Brief.

B. ENLARGEMENT OF TIME

18. It is completely contrary to the spirit and intent of Rule 1, Fed.R.Civ.P., (requiring the just, speedy and inexpensive determination of every action), to burden REDNER with the additional effort, and volume of paper, related to the instant secondary appeal, in which REDNER has no interest whatsoever.

19. As stated above, REDNER has no interest in the internecine dispute between Citrus County and the State, and, if Issue I is dismissed or stricken, REDNER will neither expend his resources nor burden the judicial effort of this Court by participating in Issue 2, which is essentially a challenge to an award of costs.[1]

20. Justice in this case is best served by enlarging the period of time in which REDNER may file a Reply Brief, herein, pending the adjudication of this Motion.

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[1] And as such may well be a non-appealable final order: "The only possible controversy which this appeal presents is as to who should pay the costs, but as was stated in *Wingert v. First National Bank of Hagerstown*, 233 U.S. 670, 32 S. Ct. 391, 56 L.Ed. 605, this is not sufficient. There, on page 672, 32 S.Ct. page 392, it is said: 'As the appeal really is prosecuted only for costs, it must be dismissed.' " *Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, Inc.*, 97 F.2d 223 (7th Cir. 1938). See, also, *Brainard v. Kovacevich*, 111 F.2d 794, (9th Cir. 1940); and *Howard v. Wilbur*, 166 F.2d 884 (6th Cir. 1948): "It is settled, however, that an appeal will not be entertained simply to determine a question of costs, when the question at issue has become moot." *Id.*, Citations omitted.

21. The undersigned attorney has consulted with counsel for Appellant and Appellee BUTTERWORTH, neither of whom object to the course of action and timing proposed herein. Counsel for Appellant, however, does note the need for an adjudication of this issue prior to June 15, 1993, in order to allow a Petition for Certiorari to be presented to the Supreme Court.[2]

WHEREFORE, REDNER respectfully moves this Honorable Court to enlarge the period of time in which REDNER may file a Reply Brief to a date 30 days after the adjudication of this Motion.

MEMORANDUM OF LAW

A. DISMISSAL OR STRIKING

An appeal brief is subject to review by Motion to Dismiss, pursuant to Rule 27, Fed.R.App.P.: *Pioneer Properties, Inc. v. Martin*, 776 F.2d 888 (10th Cir. 1985)[3]. Issue I in Appellant DEAN's initial Brief, albeit improper, seeks to overturn the Writ of *Habeas Corpus* issued as to REDNER.

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[2] The parties generally concur that the adjudication of this motion may actually expedite a decision within the time frame for Appellant to pursue his petition to the Supreme Court.

[3] Which also holds that a Motion to Dismiss may be entertained by a single judge but, if denied, may also be considered by the entire panel appointed.

The substantive appeal herein, Case No. 92-2615, has been dismissed, with a clear effect on the United States Court system:[4]

> "The defendants' argument however misunderstands the effect of dismissal on appeal in the United States Court system which
>
> > " 'is to remove any impediments to, or stay of proceedings in, the trial court which are the consequences of the appeal. Thereafter, the cause stands in the trial court as though no appeal had ever been taken, and the judgment, decree, or order appealed from becomes enforceable, as much so as though no appeal had been taken. Where the order appealed from was a final order, it remains a final order on dismissal of the appeal.' 36 C.J.S., Federal Courts, § 296(22), p. 1084.
>
> "An example of this rule of law is found in the case of *Diamond v. Thompson*, 523 F.2d 1201 (5th Cir. 1975). . . . "
>
> *Boussom v. City of Elkart*, 567 F.Supp. 1382 (N.D. Ind. 1983).

The effect of the dismissal of Case No. 92-2615 was constructively and effectively to confirm the final order issuing the Writ of *Habeas Corpus*. Appellant DEAN is not now entitled to a second appeal on the same issues, particularly by attempting to secure a second appeal by raising Issue I in the instant appeal, when it bears no

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[4] Subject, of course to the determination by the United States Supreme Court of Appellant DEAN's Petition for Certiorari.

relationship to the issue on appeal herein, and is essentially a blatant failure to respect the Order of this Court denying the Appellant's Motion to Consolidate the two appeals.

This legal principle is long established in federal jurisprudence:

> "It is quite true that two appeals are not allowed in the same case on the same question . . . " *Wheeler v. Harris,* 80 U.S. 51 (1871).[5]
>
> "We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case and must control its disposition; . . . " *Barney v. Winona,* 117 U.S. 228, 6 S.Ct. 654 (1886).
>
> "It is settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case." [Citations omitted] *Thompson v. Maxwell Land Grant and Railway Co.,* 168 U.S. 451, 18 S.Ct. 212 (1897).

In the instant case, Issue I of the Appellant's Initial Brief was properly the subject of Case No. 92-2615, which

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[5] While not unique, (as REDNER has found some case law determined as recently as 1985,) Appellant DEAN's illicit attempt to have the same question in the same case determined a second time on a second appeal, is sufficiently rare in modern jurisprudence, that REDNER is relying throughout this Memorandum of Law on several older cases, all of which remain valid.

was dismissed by this Court. Issue I is not properly argued in any respect in this Case No. 92-3033. Appellant is not allowed this "second appeal" on the same question that was decided in Case No. 92-2615.

The Circuit Courts, including this Court and its predecessor,[6] have adopted and elaborated upon the above holdings of the Supreme Court:

> "This is the second writ of error in this case. *Cole Motor Car Co. v. Hurst,* 228 Fed. 280 . . . No new question is presented by the record brought up by the pending writ of error. What the plaintiff in error seeks is a reconsideration and reversal of rulings formerly made by the court. Assuming, without deciding, that under exceptional circumstances questions decided on one writ of error or appeal are open for reconsideration by the same appellate court on a subsequent writ of error or appeal in the same case, this case is not deemed to be one calling for the exercise of such power, as it presents no exceptional feature to justify a reopening of the questions which were disposed of by this court's former decision." *Tillar v. Cole Motor Car Co.,* 246 F. 831 (5th Cir. 1917).

Similarly, the instant case clearly presents no new issue or feature which would warrant reconsideration of the dismissal of Case 92-2615. Appellant DEAN did not ask for rehearing of the dismissal of the case. Appellant DEAN now has moved the Supreme Court of the United

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[6] Binding precedent in the Eleventh Circuit, *Bonner v. City Prichard, Alabama,* 661 F.2d 1206 (11th Cir., *en banc,* 1981).

States for an enlargement of time for a petition for certiorari review of the dismissal of Case No. 92-2615. **But there is nothing in either case which would warrant reconsideration of the issues properly raised in Case No. 92-2615, now dismissed, in the instant case!**

Much of the law on this issue has been determined by the United States Court of Appeals for the Eighth Circuit, which has held:

> "These rulings also have become the law of the case, and are not open to review here. Such is the established practice in this circuit. [Citations omitted] In *Guarantee Co. of North America c. Phoenix Ins. Co.*, 124 F. 170, 174, this court, speaking by Circuit Judge Sanborn, said:
>
> > " 'Propositions of law which are considered and decided upon a first writ of error are *res judicata* upon the return of a subsequent writ in the same case, whether these propositions are right or wrong. They constitute the law of the case, and cannot be again questioned by the parties or their privies.' " *City and County of Denver v. Denver Tramway Corp.*, 23 F.2d 287 (8th Cir. 1927).
>
> "In *Pennsylvania Mining Co. v. United Mine Workers*, 28 F.2d 851, 852, this court, speaking by Judge Kenyon, said:
>
> > " 'It is the well established doctrine of the federal courts that, on a second writ of error or appeal, questions of law or fact determined upon the first hearing are not reconsidered, provided the evidence was substantially the same upon both trials. Under such circumstances questions of law determined on a writ of error or appeal are

> the law of the case, **both for the trial court and for this court on a second writ of error or appeal.' "** [Emphasis added] *Zurich General Accident & Liability Ins. Co. v. O'Keefe*, 64 D.2d 768 (8th Cir. 1933).

This Court has decided, as a matter of law, that there was a **jurisdictional defect** in Case No. 92-2615. That decision, resulting in the dismissal of the prior appeal, is a decision of law binding on this court, and which cannot be reconsidered on this "second appeal".

> "It is an established rule of law that a legal proposition, considered and determined by an appellate court, may not be questioned in any subsequent proceedings in either the trial **or appellate court.** The final decision becomes the law of the case. . . .
>
> " . . . It is true that the plea of the statute remained in its answer after the first trial, but it apparently accepted the decision of this court upon that point as final. No motion was made in this court before the mandate went down to correct the alleged error in the opinion . . . " [Emphasis added] *U.S. v. Bollman*, 81 F.2d 1009 (8th Cir. 1936).

Of special noteworthiness in the foregoing opinions, and as demonstrated herein, the cases speak to "consideration and determination", clearly including an Order of dismissal, such as the disposition of Case 92-2615, with any consideration of the merits of an appeal.

> "We are likewise of the opinion that where an appeal presents issues that have previously been adjudicated by an appellate court, such appeal should be dismissed, *In re Inland Gas Corp.*, 6 Cir. 217 F.2d 207." *Kremer v. Clarke*, 285 F.2d 735

(6th Cir. 1960); *cert. denied,* 366 U.S. 92, 81 S.Ct. 1098 (1961).

> "Appellants state that the issues here involved are practically identical with those of the former case, and challenge the correctness of this court's decision in that case. . . . our construction of the statute has become the 'law of the case,' not to be changed unless it is clearly erroneous and unsound." [Citations omitted] *Lauf v. E. G. Shinner & Co., Inc.,* 90 F.2d 250 (7th Cir. 1937); *rev'd on other grounds,* 303 U.S. 323, 58 S.Ct. 578 (1938).

In this matter, this Court's construction of the jurisdictional issues which led to the dismissal of Case No. 92-2615 has become the law of the case, and cannot be changed unless clearly erroneous and unsound, which it is not!

Even a cursory comparison of Issue I on page 1 of Appellant's Initial Brief with the Notice of Appeal in Case No. 92-2615 shows that the issues are not just "practically identical" – they are exactly identical. This Court's jurisdictional determination of Case No. 92-2615 is neither erroneous nor unsound. Therefore, the adjudication of Case No. 92-2615 becomes the law of this case, and cannot be changed. This Court has clearly recognized this principle of law.

> "We do not consider the appeal and order it dismissed. The result secured by our disposition of the application for the writ [of mandamus] is, however, substantially the same as if reached upon appeal . . . " *Atlantic Coast Line R. Co. v. Davis,* 185 F.2d 766 (5th Cir. 1950).

"It is that absence of any disagreement on controlling legal principles and the very substantial actual sameness of the records [on appeal] which leads us to the conclusion that this is a case calling imperatively for the application of the doctrine of the law of the case.

" . . .

"Of these factors, a most important consideration is a stability in the law – a sort of permanence and sureness in decision apart from the make-up or composition of the particular tribunal so far as the person of the Judges is concerned. That, of course, is a matter of growing concerns to Courts such as this one in which, as a multiple Judge tribunal, we sit by statute in panels of not more than three Judges. 28 U.S.C.A. 46(c). In more tranquil days and times, an appeal from a second trial would be heard by the same Court as the first appeal. Now, that is highly unlikely, and where it occurs, it is – at least in this Court – due entirely to the laws of chance. That puts a premium on multiple appeals. That is so because, without implying any improper purpose to litigants or their counsel, or acknowledging more than, as human beings, Judges will unavoidably have differences in emphasis, approach, or views on close questions in given areas, if the practice is followed for each succeeding panel to reach its own decisions, the losing party on the first appeal will naturally strive to bring it back a second, or a third, or a fourth time until all are exhausted. This possibility involves something other than simply more grist for our mill and as to which we should be indifferent. **One of the vices is that whether a litigant gets a second, or**

> **a third time at bat likewise depends so much on chance, or at least on factors making it most unfair that in one situation a second trial and appeal is available while in another one it is lacking.** . . . " [Emphasis added] *Lincoln National Life Insurance Co. v. Roosth*, 306 F.2d 110 (5th Cir. 1962).

In the instant case, Appellant DEAN clearly hopes that a second panel, otherwise unaware of the Dismissal of Case 92-2615, would consider Issue I on the merits and provide Appellant DEAN with a result different than that he now faces.

Dismissal of appeals has the same effect as an adjudication on the merits, *see, e.g., Hartmann v. Sloan*, 99 F.2d 942 (3d Cir. 1938). Further:

> " . . . They attempt to attack the factual basis for the decree entered July 30, 1973. That contention comes too late. It could have been raised on the appeal from that decree, but the appeal was dismissed by agreement of the parties. The judgments now sought to be appealed from are the result of supplemental proceedings . . . " *Diamond v. Thompson*, 523 F.2d 1201 (5th Cir. 1975).

See, also, *Boussom, supra.*

Therefore, the dismissal of a case, by whatever means, acts as an equal bar to the relitigation of the same issues in a subsequent appeal, and, therefore, Issue I in Appellant's Initial Brief must be dismissed or stricken.

From the record before this Court, it is clear that the Order of Dismissal in Case No. 92-2615 was proper. Appellant DEAN should not be allowed this improper

second appeal by raising the same matters in Issue I of Appellant's Initial Brief which were dismissed in Case No. 92-2615.

B. ENLARGEMENT OF TIME

Rule 1, Fed.R.Civ.P., requires the just, speedy and inexpensive determination of every action applies to the District Court and to the resolution of these matters. Rule 26(b), Fed.R.App.P. provides that time limits imposed by the Rules may be enlarged "for good cause shown".

Judicial economy and conservation of the resources of the parties are best accomplished by allowing REDNER to defer filing a Reply Brief, until the adjudication of this Motion, and if REDNER prevails on this Motion, then he will file no Reply Brief and participate no further in this matter.

See, *e.g.*, *Anderson v. Stanco Sports Library, Inc.*, 52 FRD 108 (D.C. Del. 1953), holding that enlargements of time should be granted so that justice may be done; and *Home Insurance Co. v. Paige*, 255 F.Supp. 51 (D.C. Md. 1961), approving an enlargement of time stipulated to by the parties.

REDNER has shown good cause why Issue I of Appellant's Initial Brief should be Dismissed or Stricken, and, with said good cause supporting the substance of this Motion, REDNER has also shown good cause for a

delay in the submittal, if necessary, of REDNER's Reply Brief herein.

Respectfully submitted,

/s/ Luke Charles Lirot
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Attorney for REDNER

CERTIFICATE OF SERVICE

I hereby certify that the original and four copies of the above and foregoing have been filed with the United States Court of Appeals for the Eleventh Circuit, and that true copies of the foregoing have been furnished by overnight United States Mail to Russell W. LaPeer, Esq., P.O. Box 1450, Ocala, Fl., 34478 and to Rebecca Wall, Esq., Assistant State Attorney General, 210 Palmetto Avenue, Suite 447, Daytona Beach, Fla., 32114 this 22 day of April, 1993.

/s/ Luke Charles Lirot
Luke Charles Lirot

M17

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES S. DEAN, Sheriff
of CITRUS COUNTY, Florida,

Appellant

v.

ROBERT BUTTERWORTH, the
Attorney General of the
State of Florida,
and
JOSEPH RICHARD REDNER,

Appellees

_____/

No. 92-3033

(Middle District
of Florida
No. 91-90-Civ.-
Oc-10)

APPELLEE REDNER'S MOTION TO STRIKE OR DISMISS ISSUE I IN APPELLANT CITRUS COUNTY'S INITIAL BRIEF AND MOTION FOR AN ENLARGEMENT OF TIME IN WHICH TO FILE A REPLY BRIEF, IF NECESSARY AND MEMORANDUM OF LAW

LIST OF EXHIBITS

A. Notice of Appeal, June 16, 1992

B. Notice of Appeal, October 9, 1992

C. Order Denying Motion to Consolidate, and Dismissing Case No. 92-2615

D. Dean's Motion for Extension of Time to File Petition for Writ of Certiorari.

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 92-3033

CHARLES S. DEAN, Sheriff
of Citrus County, Florida,

Appellant,

v.

ROBERT BUTTERWORTH, the
Attorney General of the State
of Florida and
JOSEPH RICHARD REDNER,

Appellees.
_____/

RESPONSE TO MOTION TO STRIKE OR DISMISS

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Attorneys for Appellant, Charles S. Dean, Sheriff, Citrus County, Florida

CERTIFICATE OF INTERESTED PERSONS

The following list of interested persons is certified, pursuant to Eleventh Circuit Court of Appeals Rules 26.1-1-3 & 27-1(a).

The Honorable Susan H. Black
Robert Butterworth
Charles S. Dean
The Honorable William Terrell Hodges
Russell W. LaPeer
Luke Charles Lirot
David S. Morgan
Pattillo & McKeever, P.A.
Joseph Richard Redner
The Honorable Harvey E. Schlesinger
The Honorable John E. Steele
Rebecca Roark Wall
Robert R. Wheeler

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS TO DATE

On March 25, 1988, Citrus County's temporary adult-entertainment licensing ordinance became effective. After that date, Appellee Joseph Richard Redner three times opened an adult dancing establishment without the requisite license. He was thrice arrested, and eventually was convicted in the Citrus County court of three times violating the ordinance. After appeals through the state appellate courts, his convictions were affirmed.[1]

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[1] In the meanwhile, he brought two lawsuits in the district court below, under 42 U.S.C. § 1983, claiming the violation of rights guaranteed under federal and state law, by enforcement of the adult-entertainment licensing ordinance against him in the criminal prosecutions, as well as the enforcement of the adult-entertainment zoning ordinance against the operation of an adult-entertainment establishment at his proposed location. He sought declaratory, injunctive, and compensatory relief in the first case (concerning the licensing ordinance), and declaratory and injunctive relief in the second case (concerning the zoning ordinance).

In May, 1991, the Citrus County court ordered Plaintiff to begin serving his sentence at the Citrus County jail. At that time he filed in the same district court a petition for writ of habeas corpus, under 28 U.S.C. § 2254. An emergency motion for stay of sentence was denied. Eventually the court accepted the recommendation of a United States magistrate judge, to grant the petition and order the writ of habeas corpus to be issued; and an initial civil judgment was entered on May 18, 1992. Appellant Dean filed a notice of appeal from that judgment on June 17, 1992. (That appeal became appellate case number 92-2615.)

Meanwhile, on May 20, 1992, Appellee Robert Butterworth, the Attorney General of Florida, filed a postjudgment motion entitled "Motion for Relief from Judgment, Motion to Amend Judgment." By this motion, Appellee Butterworth sought to be relieved from responsibility for setting aside the convictions of Mr. Redner, and for any costs and financial obligations incurred as a result of the writ of habeas corpus. Appellant Dean opposed that motion.

On September 15, 1992, the district court granted that postjudgment motion. The district court treated it as a motion to amend the judgment under Fed. R. Civ. P. 59(e), and issued an amended civil judgment on September 15, 1992. Appellant Dean then filed a notice of appeal from the amended judgment on October 13, 1992. (That appeal became appellate case number 92-3033.)

Before the district court's September 15, 1992 order granting the postjudgment motion of Appellee Butterworth, this Court raised *sua sponte* a question concerning

its appellate jurisdiction in the first appeal (92-2615), because of that pending motion by the Florida attorney general. If that motion were truly a motion to amend the judgment, under Rule 59(e), then the initial, civil judgment entered by the district court on May 18, 1992, would not be a final, appealable judgment.

Based on Supreme Court authority, Appellant Dean argued that, despite the nomenclature given by the Florida attorney general, the nature of the motion was not truly to amend the judgment under Rule 59(e), but for an order on collateral matters. If that were true, then the initial judgment of May 18, 1992, would be final and appealable, and this Court would have review jurisdiction in the first appeal (92-2615).

This Court ultimately ruled, on January 20, 1993, that the Florida attorney general's postjudgment motion was a Rule 59(e) motion: that the district court's initial judgment on May 18, 1992, was not a final, appealable order, nullifying any review jurisdiction by this Court on the first appeal (92-2615); and that this ruling did not affect the appeal from the district court's amended civil judgment of September 15, 1992.[2] (Exhibit A)

On March 31, 1993, Appellant Dean filed his appellant's brief in this appeal, addressing the issues of the district court's rulings (1) granting the petition of Appellee Redner for a writ of habeas corpus, and (2) granting the postjudgment motion of Appellee Butterworth to be

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[2] This Court also "denied as moot" Appellant Dean's motion to consolidate the two appeals, 92-2615 and 92-3033. (Exhibit B)

relieved from the responsibility of setting aside Mr. Redner's convictions and the consequent costs. On or about April 23, 1993, Appellee Redner filed the instant motion to strike or dismiss issue I in appellant's brief[3] (as well as for an enlargement of time within which to file appellee's brief). The Florida attorney general, Appellee Butterworth, has since filed a motion to adopt and join in the

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[3] The present challenge by Appellee Redner, to the right of Appellant Dean to appeal the substantive merits of the district court's ruling in this habeas corpus case, was expected.

Appellant recognized that if this Court rejects that challenge, it would be consistent with this Court's interpretation of the May 20, 1992 postjudgment motion by Appellee Butterworth as a Rule 59(e) motion, which nullified the June 17, 1992 notice of appeal and precluded appellate review jurisdiction over the district court's May 18, 1992 judgment; destroyed the finality and appealability of that judgment; and left the September 15, 1992 amended judgment as the only final and appealable judgment in this case (appealable only by means of the October 13, 1992 notice of appeal – the notice producing the present appeal, which this Court's order dismissing the first appeal for lack of jurisdiction, expressly declared as "not affect[ed]").

On the other hand, if this Court were to sustain the current challenge by Appellee Redner, that would be inconsistent with the nature and effect of this Court's dismissal of the first appeal for lack of jurisdiction; and one of the means of relief would be a petition for writ of certiorari concerning the dismissal of the first appeal.

The first ruling will eliminate any need to petition for certiorari; the second will necessitate it. For that reason, to preserve the right of Appellant Dean, while protecting against the eventuality of an unnecessary petition for certiorari; Appellant Dean sought, and obtained, from Justice Anthony M. Kennedy, a 60-day extension of time (through June 15, 1993), within which to file a petition for writ of certiorari if it should become needed.

motion to strike or dismiss, and for a like enlargement of time to file his appellee's brief.

For the reasons set forth in this response, addressed to the principal motion (by Appellee Redner) to strike or dismiss, and to the motion (by Appellee Butterworth) to adopt and join in that motion, the motion to strike or dismiss should be denied.[4]

ARGUMENT

I. THIS APPEAL, FROM THE ONLY FINAL, APPEALABLE JUDGMENT IN THIS HABEAS CORPUS CASE, PROPERLY PRESENTS THE DISTRICT COURT'S RULING ON THE MERITS.

A. The June 17, 1992, Notice of Appeal was Ineffective, and that Appeal was a Nullity.

The district court's May 18, 1992 civil judgment was either a final, appealable judgment, or it was not.

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[4] The assertion that "a Motion to Dismiss may be entertained by a single judge but, if denied, may also be considered by the entire panel appointed," citing *Pioneer Properties, Inc. v. Martin*, 776 F.2d 888 (10th Cir. 1985), Appellee Redner's Memorandum of Law in Support of Motion to Strike or Dismiss (hereafter 'Motion to Strike or Dismiss'), at 6 n.3, is misleading, because it is inaccurate.

In that case, a single judge denied a motion to dismiss the appeal, which "was a procedural order, requiring the appeal to be put on the calendar and briefed; it was not a determination of the validity of the appeal." 766 F.2d at 890 n.1. The most that the case suggests is that (at least within the Tenth Circuit) a motion to strike or dismiss (such as Appellee Redner's) may perhaps be denied by a single judge; but otherwise it must be considered by the court itself. In fact, the Tenth Circuit itself stated that a "single judge may not determine an appeal," which would include the dismissal of an appeal on a motion to dismiss. *Id.*

Once the Florida attorney general's postjudgment motion was filed, whether the district court's May 18, 1992 judgment was final and appealable, depended on the determination of the attorney general's postjudgment motions. If that motion was one to amend the judgment under Fed. R. Civ. P. 59(e), then by the terms of Fed. R. App. P. 4(a) (4), the May 18, 1992 judgment could not be final and appealable until after disposition of that motion.

"Because [Rule] 4(a)(4) renders ineffective any notice of appeal filed while a Rule 59(e) motion is pending, the decision whether a particular pending motion falls under Rule 59(e) will of necessity determine whether an otherwise final judgment is appealable." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 177, 109 S.Ct. 987, 992, 103 L.Ed. 2d 146 (1989).[5]

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[5] The test for deciding whether a postjudgment motion is a Rule 59(e) motion was followed by this Court in *Osterneck v. E.T. Barwick Inds., Inc.*, 825 F.2d 1521 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney, supra*: "*Rule 59(e) applies only when* a motion seeks *reconsideration of substantive issues resolved in the judgment* and not when a motion raises exclusively collateral questions regarding what is due because of the judgment." *Id.* at 1526 (emphasis added).

> [T]he general framework for determining whether a postjudgment motion constitutes a Rule 59(e) motion to alter or amend the judgment [is] that a postjudgment motion will be considered a Rule 59(e) motion where it involves "reconsideration of matters properly encompassed in a decision on the merits."

Osterneck v. Ernst & Whinney, 489 U.S. at 174, 109 S.Ct. at 990, quoting *White v. New Hampshire Dep't. of Employment Security*, 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, 71 L.Ed.2d 325 (1982).

In the first attempted appeal in this habeas corpus case, this Court ruled that the attorney general's motion in the district court should be "properly construed as a Fed. R. Civ. P. 59(e) motion which tolled the time for filing of a notice of appeal and rendered the appeal in Case No. 92-2615 premature and ineffective" (notwithstanding contrary arguments by Appellant Dean). This Court's dismissal of the first appeal (92-2615) meant that the first appeal disintegrated, because the judgment to be appealed was neither final, nor appealable.

The dismissal of the first appeal for lack of jurisdiction, was not a judgment on the merits of that appeal.[6]

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[6] The current motion to strike or dismiss is bottomed on a fundamental misunderstanding about the nature and effect of this Court's dismissal of the first appeal for lack of jurisdiction. The motion of Appellee Butterworth, the Florida attorney general, to join in that motion to strike or dismiss, is equally mistaken about the dismissal of the first appeal for lack of jurisdiction.

"*The effect of the dismissal of [the first appeal] Case No. 92-2615 was constructively and effectively to confirm the final order issuing the Writ of Habeas Corpus.*" Motion to Strike or Dismiss, at 7 (emphasis added).

> This Court has decided, as a matter of law, that there was a *jurisdictional defect* in Case No. 92-2615. That decision, resulting in dismissal of the prior appeal, is a decision of law binding on this Court, and which cannot be reconsidered on this "second appeal".

Id. at 9 (emphasis in original).

If this means simply that this Court's determination of the jurisdictional question concerning the first appeal is a binding ruling of law on the issue of appellate-review jurisdiction, that is beyond dispute. Appellees Redner and the Florida attorney general, however, mistakenly believe that the decision about the

An appellate court's dismissal of an appeal for lack of jurisdiction is not a ruling by that court on the merits of the claims and issues contained in the appeal. In fact, the dismissal for lack of jurisdiction means that no jurisdiction exists with which to consider the merits presented in that appeal. *See, e.g., United States v. Sisson*, 399 U.S. 267, 270-71, 90 S.Ct. 2117, 2120, 26 L.Ed.2d 608 (1970) (appeal of directed acquittal dismissed for lack of jurisdiction; court without jurisdiction to consider merits).[7]

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jurisdictional question in the first appeal was also a decision on the merits of the issues to be presented by that appeal.

"*Dismissal of appeals has the same effect as an adjudication on the merits*"; and "[t]herefore, *the dismissal of a case, by whatever means, acts as an equal bar to the relitigation of the same issues in a subsequent appeal*, and, therefore, [sic] Issue I in Appellant's Initial Brief [sic] must be dismissed or stricken." *Id.* at 12 (emphasis added).

"Appellee Butterworth likewise asks this court to strike or dismiss Issue I as *inappropriately argued in an appeal which this court has already decided*." Motion to Adopt, at 2 (emphasis added).

[7] *Cf. FDIC v. Deck*, 986 F.2d 1427 (10th Cir. 1992) (appeal dismissed for lack of jurisdiction, for failure to comply with Fed. R. App. P. 4(a), without reaching merits); *Robinson v. Champion*, 982 F.2d 529 (10th Cir. 1992) (same); *United States v. Diodato*, 879 F.2d 863 (4th Cir. 1989) (because order appealed was interlocutory and nonappealable, appeal dismissed for lack of jurisdiction without reaching merits); *Pratt v. McCarthy*, 850 F.2d 590, 594 (9th Cir. 1988) (untimely appeal dismissed for lack of jurisdiction without deciding merits of appeal); *Robinson v. Tanner*, 798 F.2d 1378, 1379 (11th Cir. 1986) (lacking jurisdiction under appellate rule 4, appeal dismissed without deciding merits), *cert. denied*, 481 U.S 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987).

Hartmann v. Sloan, 99 F.2d 942 (3d Cir. 1938), – incorrectly stated by Appellee Redner to represent the proposition that "[d]ismissal of appeals has the same effect as an adjudication on

In *McLaughlin v. City of LaGrange*, 662 F.2d 1385 (11th Cir. 1981), *cert. denied*, 456 U.S. 979, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982), the appellants prematurely filed a notice of appeal (81-7411) before entry of the Rule 54(b) final judgment. "Recognizing their mistake, appellants noticed a new appeal [81-7627] after entry of the Rule 54(b) order." *Id.* at 1387. "Thus, two appeals [we]re before this Court, but both relate[d] to the same summary judgment order of the District Court." *Id.*

This Court dismissed the first appeal (81-7411), recognizing that it "lack[ed] jurisdiction over the premature appeal." *Id.* At the same time, this Court specified that the second appeal (81-7627) was a viable appeal, not yet determined on its merits, and "need not suffer the same fate" as the first appeal. *Id.*

Without jurisdiction, the appellate court does not have the power to remand the case to the district court, much less make a decision on the merits.

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

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the merits," Motion to Strike or Dismiss, at 12, – stands for the contrary principle. The right to appeal a judgment discharging a writ of habeas corpus, had later been withdrawn by Congress, and the court dismissed the appeal for lack of jurisdiction. *Id.* at 945. The court expressly stated that, because its jurisdiction was withdrawn before a judgment was entered, it was required to dismiss the appeal without ruling on the merits. *Id.*

United States v. McKnight, 593 F.2d 230, 233 (3d Cir. 1979), quoting *Ex Parte McCardle*, 74 U.S. 506, 514, 19 L.Ed.2d 264 (1968).

In *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648 (7th Cir. 1984), the district court dismissed the plaintiffs' complaint for failure to state a claim and denied the plaintiffs' motion to file an amended complaint. *Id.* at 652. The plaintiffs moved to alter or amend the judgment under Rule 59(e), and at the same time filed a notice of appeal. *Id.*

The district court dismissed the plaintiffs' motions, on the mistaken belief that the first notice of appeal divested the lower court of jurisdiction to determine the motions. *Id.* The plaintiffs then filed a second notice of appeal. *Id.*

The court of appeals ruled that the Rule 59(e) motion was valid, and the filing of the first notice of appeal did not divest the district court of jurisdiction. *Id.* The first notice of appeal had no effect before the district judge acted on the Rule 59(e) motion. *Id.* However, the second notice of appeal, based on the same issues and facts as the first notice of appeal, "properly brings up to us all of the district judge's orders." *Id.*

> The filing of a proper Rule 59(e) motion suspends the thirty-day period for filing a notice of appeal from the final judgment until the motion is acted on. It was acted on here when the district judge dismissed it. At this point the plaintiffs had thirty days to file a notice of appeal from the judgment, from the order denying leave to amend the complaint entered at the

> same time, and from the order disposing of their Rule 59(e) motion; and they met the deadline.

Id. The plaintiffs were not foreclosed from bringing the second appeal which presented the same rulings as attempted by the premature, ineffective, first notice of appeal, but which the court of appeals never determined on its merits.

When a notice of appeal is, or becomes, ineffective and null because of a pending Rule 59(e) motion, the court requires the appellant to file a second notice of appeal after disposition of the motion.[8]

> However, Rule 4(a)(4) provides that if a timely motion is made to alter or amend the judgment under Fed. R. Civ. P. 59(e), a notice of appeal

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[8] Similarly, when an appellant files an ineffective notice of appeal without proper Rule 54(b) certification, the appellant must file a new notice of appeal after the district court enters a final judgment under Rule 54(b). *In re. Yarn Processing Patent Validity Litigation*, 680 F.2d 1338, 1340 (11th Cir. 1982); *In re. Matter of Good Deal Supermarkets, Inc.*, 528 F.2d 710, 712 (3d Cir. 1975).

Additionally, if briefs and the record were prepared in connection with the first, but ineffective, appeal, but were never considered by the court because of the nullity of the first appeal, the court may consider those briefs and record when ruling on the identical issues presented in the second appeal. *In re. Yarn Processing Patent Validity Litigation*, 680 F.2d at 1340); *In re. Matter of Good Deal Supermarkets, Inc.*, 528 F.2d at 712. This illustrates that the appellate court reached no decision on the merits in the first, ineffective appeal, and is not simply reconsidering those issues in the second appeal. The second appeal was the first time the court could consider and determine the case on the merits.

> filed before disposition of that motion is a nullity. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 60-61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982). In such a case, to perfect an appeal, the party must file a new notice of appeal within thirty days after disposition of the motion. Fed. R. App. P. 4(a)(4).

Bordallo v. Reyes, 763 F.2d 1098, 1101 (9th Cir. 1985). *See also Skagerberg v. State of Okla.*, 797 F.2d 881, 883 (10th Cir. 1986) (appellant required to file new notice of appeal in accordance with Fed. R. App. P. 4(a)(1), after ruling on Rule 59(e) motion).

Courts consistently note, when dismissing appeals for lack of jurisdiction because of a pending Rule 59 motion, that when the district court rules on the outstanding motion, appellant has a right to file a new notice of appeal. *See Mondrow v. Fountain House*, 867 F.2d 798, 800 (3d Cir. 1989); *Rados v. Celotex Corp.*, 809 F.2d 170, 172 (2d Cir. 1986).

"[T]he post-1979 effect of a Rule 59 motion on a previously filed notice of appeal [is that] '[t]he appeal simply self-destructs.'" *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225, quoting J. Moore, W. Taggart & J. Wicker, 9 Moore's Federal Practice ¶ 204.12[1], p.4-65, n.7 (1982). A notice of appeal filed before, or after, a timely motion under Rule 59 is "not merely defective; it [is] a nullity." *Id.*

> Under the plain language of the current Rule, a premature notice of appeal "shall have no effect"; a new notice of appeal "must be filed." In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all,

> the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is "'mandatory and jurisdictional.'"

Id.

Similarly, the notion that the dismissal of a first appeal for lack of jurisdiction becomes the "law of the case,"[9] precluding consideration of the substantive issues on the merits in a second, valid appeal, is just as mistaken. "The doctrine of the law of the case comes into play only with respect to issues previously determined." *Quern v. Jordan*, 440 U.S. 332, 348 n.18, 99 S.Ct. 1139, 1148 n.18, 39 L.Ed.2d 358 (1979). *Accord Gaines v. Dougherty Cty. Bd. of Educ.*, 775 F.2d 1565, 1568 (11th Cir. 1985).

The "law of the case doctrine" is the rule that "the trial court and appellate courts are bound by any findings of fact or conclusions of law made by the appellate court in a prior appeal of the case at issue." *United States v. Burns*, 662 F.2d 1378, 1384 (11th Cir. 1981). As a "self-imposed" judicial restriction, the doctrine

> "[I]nvokes the rule that findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal." *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678 (11th Cir. 1984). The doctrine "generally operates to preclude a reexamination of issues decided upon appeal, either by the district court on remand or by the appellate court itself upon a subsequent appeal." *Conway v.*

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[9] Motion to Strike or Dismiss, at 9-12; Motion to Adopt, at 2.

> *Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061 (5th Cir. 1981). "A federal court enunciating a rule of law to be applied in a particular case establishes the 'law of the case,' which 'other courts owing obedience to it *must*, and which itself will, normally apply to the same issues and subsequent proceedings in that case.' " *William G. Roe & Co. v. Armour & Co.*, 414 F.2d 862, 867 (5th Cir. 1969), quoting 1 MOORE FEDERAL PRACTICE § 0.404(1) (emphasis in original).

Westbrook v. Zant, 743 F.2d 764, 768 (11th Cir. 1984).

"The doctrine does not extend to every issue that could be ever raised in a given litigation but rather is limited to those issues previously decided; the law is clear, however, that the law of the case doctrine 'comprehends things *decided by necessary implication* as well as those decided explicitly.' " *Heathcoat v. Potts*, 905 F.2d 367, 370 (11th Cir. 1990), quoting *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984) (emphasis in original).

> The law of the case doctrine was created to ensure that authority and responsibility remain properly allocated among the courts. The doctrine is based on the premise that an appellate decision is binding in all subsequent proceedings in the same case unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.

Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1510 (11th Cir. 1987), *cert. denied*, 484 U.S. 1006, 108 S.Ct. 700, 98 L.Ed.2d 652 (1988).

This Court's dismissal of the first appeal (92-2615) determined one issue only: this Court had no appellate review jurisdiction, because the notice of appeal was premature and ineffective, rendering the appeal null and void. This Court did not make – because it had no jurisdiction to make – any determination on the issues comprising the merits of that appeal. No "law of the case" could have been established, because this Court lacked jurisdiction to make any. This second appeal properly presents, for the first time, the issues comprising the merits of the case, and the Court is free to make independent determinations. *See Hester v. International Union of Operating Engineers*, 941 F.2d 1574, 1581 (11th Cir. 1991) (courts free to address, as matter of first impression, issues not disposed of on earlier appeal, notwithstanding law of case doctrine).

B. The District Court's May 18, 1992 Judgment was neither Final, nor Appealable.

The effect of the Rule 59(e) motion to amend the judgment, "suspend[ed] the running of the time for appeal and effectively removed the finality of the original judgment." *Markham v. Holt*, 369 F.2d 940, 942 n.5 (5th Cir. 1966). "When the Rule 59(e) motion was timely filed, the judgment of the district court was no longer a final judgment."[10] *Portis v. Harris Cty., Tex.*, 632 F.2d 486, 487 (5th Cir. 1980).

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[10] *Diamond v. Thompson*, 523 F.2d 1201 (5th Cir. 1975), and *Boussom v. City of Elkhart*, 567 F. Supp. 1382 (N.D. Ind. 1983) (cited by Appellee, Motion to Dismiss or Strike, at 6-7, 12), are inapplicable for that important difference. Those cases were appeals from final judgments, and the appeals were later dismissed by the parties'

"A motion to alter or amend a judgment under Rule 59(e) that is served not later than 10 days after entry of judgment destroys the finality of the judgment for purposes of appeal. If the motion is denied the finality of the

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agreements under Fed. R. App. P. 42(b). *Diamond v. Thompson*, 523 F.2d at 1203; *Boussom v. City of Elkhart*, 567 F. Supp. at 1390. When the appellants still later tried to appeal again those issues, by filing second notices of appeal, they were dismissed by the appellate courts. *Id.*

In the case at hand, the May 18, 1992 judgment was not a final, appealable judgment once the Florida attorney general's postjudgment motion was filed; and it could never be a final judgment once that motion was treated as a Rule 59(e) motion that necessitated and produced a new, amended judgment (September 15, 1992). This non-final, non-appealable judgment, and the ineffective, nullified notice of appeal from it, produced no decision from this Court (other than that it lacked appellate jurisdiction), because the judgment was neither final, nor appealable.

Dismissal of the first appeal was not by any agreement between the parties, but because this Court concluded that jurisdiction was missing, and no effective appeal existed or could have been brought from the May 18, 1992 judgment; and this Court never ruled on the merits of the case.

Kremer v. Clarke, 285 F.2d 735 (6th Cir. 1960), *In re. Inland Gas Corp.*, 217 F.2d 207 (6th Cir. 1954), and *Lauf v. E. G. Shinner & Co.*, 90 F.2d 250 (7th Cir. 1937), – cited by Appellee Redner (Motion to Strike or Dismiss, at 10) as precluding consideration of the same "issues that have been previously adjudicated," *Kremer v. Clarke*, 285 F.2d at 737 – are even farther afield. In each of those cases, the second appeals, of the same issues that had been decided in first appeals, were dismissed as being foreclosed by the appellate courts' earlier decisions on the merits.

Here, the dismissal of the first appeal for lack of jurisdiction left undetermined the merits, which would have been presented if there had been a final, appealable judgment to appeal; but which are before this Court for the first time only by means of the instant appeal.

judgment is re-established." *York v. Tate*, 858 F.2d 322, 325 n.2 (6th Cir. 1988), *cert. denied*, 490 U.S. 1049, 109 S.Ct. 1960, 104 L.Ed.2d 428 (1989), quoting 6A MOORE'S FEDERAL PRACTICE ¶ 59.13[4]. The "motion for amendment of judgment, filed pursuant to Rule 59(e), suspended the finality of the [May 18, 1992] judgment until the entry of the order disposing of this motion." *Wikoff v. Vanderveld*, 897 F.2d 232, 236 (7th Cir. 1990). As it turns out, the May 18, 1992 judgment never became final: once the Court granted the postjudgment motion as one under Rule 59(e), it entered an amended judgment on September 15, 1992. That amended judgment incorporated the terms of the earlier, non-final judgment, and contained an additional ruling relieving Appellee Butterworth from the responsibility for setting aside Appellant Redner's convictions and for payment of costs incurred as a result of Appellee Redner's petition for writ of habeas corpus.

C. The Rulings that Produced the District Court's May 18, 1992 Judgment are Incorporated into its September 15, 1992 Amended Judgment.

The October 19, 1992 – the second – notice of appeal, from the district court's September 15, 1992 amended judgment, is an appeal of the only final judgment in this habeas corpus case. As such, that appeal has preserved and presented for this Court, the district court's rulings on the merits, that originally had been intended to produce a May 18, 1992 judgment, but which (as already noted) were incorporated into the district court's September 15, 1992 amended judgment.

When a court grants a Rule 59 motion, it substantively alters the earlier judgment to which the Rule 59 motion was directed, *see Wages v. IRS*, 915 F.2d 1230, 1233 n.3 (9th Cir. 1990), negating the finality of the earlier judgment. The granting of a Rule 59 motion also produces a new judgment, with its own finality, and begins all over the applicable time periods – whether for appeal, or for additional Rule 59 motions.[11]

> A significant change in a judgment starts all time periods anew, whether the district court alters the judgment at the request of a party or on its own motion. See *FTC v. Minneapolis-Honeywell [Regulator] Co.*, 344 U.S. 206, 211, 73 S.Ct. 245, 248-49, 97 L.Ed. 245 (1952). The ability to file a new motion under Rule 59 comes from the fact that an altered judgment is a "new judgment" with new periods of time, and not from the identity of the party filing the paper. . . .
>
> Moreover, when portions of a judgment are related, an alteration of one portion restarts the time with respect to all portions. *United States v. Adams*, 383 U.S. 39, 41-42, 86 S.Ct. 708, 709-10, 15 L.Ed.2d 572 (1966).

Charles v. Daley, 799 F.2d at 348. "[W]hen the court grants a Rule 59(e) motion, [it] render[s] a 'new judgment,' [and]

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[11] *Herzog Contracting Corp. v. McGowan Corp.*, 976 F.2d 1062, 1065-66 (7th Cir. 1992) (valid Rule 59(e) motion "stopped the appeal clock" tolling time for appeal); *Bank Leumi Le-Israel, D.M. v. Lee*, 928 F.2d 232, 234 (7th Cir. 1991) (same); *York v. Tate*, 858 F.2d at 325-26 (grant of Rule 59(e) motion produced new judgment, to which new Rule 59(e) motion produced new judgment, to which new Rule 59(e) motion was applicable); *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) (same).

Rule 58 requires that the new judgment be set forth on a separate document." *Wikoff v. Vanderveld*, 897 F.2d 236.[12] "An order substantively changing a judgment constitutes a new judgment with its own time for appeal at least where the change is the subject matter to be reviewed." *Keith v. Truck Stops Corp. of Amer.*, 909 F.2d 743, 746 (3d Cir. 1990).

> The test for whether a change is sufficient to begin anew the time for appeal "is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."

Id., quoting *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. at 212, 73 S.Ct. at 249.

The district court's September 15, 1992 amended judgment, repeated that court's ruling that Appellee Redner's judgments of conviction should be set aside; but it relieved the Florida attorney general from any responsibility for doing so. While the amended judgment reaffirmed the ruling that Appellee Redner's judgments of conviction should be set aside, it excluded the attorney

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[12] *Wikoff v. Vanderveld* presented the jurisdictional question whether, after granting a Rule 59(e) motion, the district court had to set forth the "new judgment" on a separate document, under Rule 58, before a notice of appeal could be filed. That issue does not exist here, since the district court directed the clerk "to amend the judgment to relieve [Appellee] Butterworth from responsibility for costs and of setting aside [Appellee Redner's] judgment of conviction."

general from that obligation, imposing it solely on Appellant Dean.[13]

D. The October 19, 1992 Notice of Appeal is Sufficient Under Fed. R. App. P. 3, to Appeal all of the District Court's Substantive Rulings on the Merits.

The cardinal principles governing Fed. R. App. P. 3 and notices of appeal are set forth, and illustrated, by the Court in *Smith v. Barry*, ___ U.S. ___, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992).[14]

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[13] *Cobb v. Miller*, 818 F.2d 1227 (5th Cir. 1987), was the converse. An initial judgment of liability had not included one of the defendants. A Rule 59(e) motion to amend the judgment made it "non-final." *Id.* at 1238. When the Rule 59(e) motion was granted, an amended judgment was issued "to include [the additional party defendant] as a defendant who was liable to [the plaintiff]." *Id.* The amended judgment was the "final judgment," for which a notice of appeal was required within thirty days. *Id.*

[14] The plaintiff was a Maryland inmate who sued two prison administrators, seven corrections officers, two state psychologists, and a private physician. The district court dismissed the claim against the private physician on the ground that he did not act under color of state law, an essential element for a civil rights action under 42 U.S.C. § 1983. After the plaintiff completed his case-in-chief at trial, the district court directed a verdict against him, in favor of the prison administrators and officers on two of the plaintiff's claims. The jury ultimately found two staff psychologists liable for deliberate indifference to the plaintiff's medical needs and awarded damages.

The two psychologists filed a timely motion for JNOV; but before the court denied it, the plaintiff filed a notice of appeal *pro se*. That "notice of appeal was in fact invalid under Fed. R. App. P. 4(a)(4), which provides that a notice of appeal filed

Rule 3(a) specifies that "[a]n appeal permitted by law as a right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." *Id.* at 681. "Rule 3(c) governs the content of notices of appeal: notices '[1] shall specify the party or parties taking the appeal; [2] shall designate the judgment, order or part thereof appealed from; and [3] shall name the court to which the appeal is taken.' " *Id.* While compliance with Rule 3 is a jurisdictional prerequisite for appellate review "[c]ourts will liberally construe the requirements of Rule 3." *Id.* at 681-82.

> While a notice of appeal must specifically indicate the litigant's intent to seek appellate review, *see Foman [v. Davis], supra*, 371 U.S., at 181, 83 S.Ct., at 229; *Torres [v. Oakland Scavenger Co.,]* 487 U.S. [312], 317-318, 108 S.Ct. [2405], 2409-2410, [101 L.Ed. 2d 285 (1988)], the purpose of this requirement is to ensure that the filing

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before the disposition of a timely J.N.O.V. motion is without effect." Nonetheless, the clerk of the Fourth Circuit Court of Appeals sent to the plaintiff standard forms for *pro se* appeals. The plaintiff completed and returned the form timely to the court of appeals, "within the deadline for filing a notice of appeal." *Id.* at 681.

The court of appeals dismissed the appeal "for want of jurisdiction," holding that the plaintiff's "notice of appeal was untimely and that his informal brief was not the 'functional equivalent' of the notice of appeal Rule 3 requires." *Id.* The Supreme Court granted certiorari to consider the question "whether an appellate brief may serve as the notice of appeal required by Rule 3." *Id.* The Court reversed, ruling that the court of appeals should consider whether the form filed by the plaintiff, in response to that court's own directions, sufficed to satisfy the requirements of Rule 3.

> provides sufficient notice to other parties and the courts. . . . *Thus, the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal.* If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.

Id. at 682 (emphasis added). *Accord Ortberg v. Moody*, 961 F.2d 135 (9th Cir. 1992) *cert. denied*, ___ U.S. ___, 113 S.Ct. 225, 121 L.Ed.2d 162 (1992);[15] *Williams v. GMC*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982);[16] *Wade v. Mississippi Cooperative Extension Serv.*, 528 F.2d 508, 511 n.3 (5th Cir. 1976)

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[15] In *Ortberg v. Moody*, a habeas corpus case, an application for a certificate of probable cause was filed within thirty days of the district court's order dismissing the petition; but a notice of appeal was not filed until thirteen months later, because the petitioner had been awaiting the certificate of probable cause from the district court. 961 F.2d at 137.

Confronted with the question of its jurisdiction, the court of appeals ruled that " 'a request for certificate of probable cause can serve 'double duty' as notice of appeal.' " *Id.* "The language and underlying purpose of Rule 3 support our holding." *Id.*, citing *Smith v. Barry*. "[A]s long as the filed document evidences a clear intent to appeal and meets the content and timing requirements of Rules 3(c) and 4, the document may function as a notice of appeal." *Id.*

[16] *Williams v. GMC* was an Age Discrimination in Employment Act lawsuit against GM, by nineteen plaintiffs, seeking damages, back pay, attorneys' fees, and injunctive relief. 656 F.2d at 122. After a three-week jury trial, *id.*, the district court granted GM's motion for directed verdict against two of the plaintiffs for failure "to establish any monetary loss resulting from their respective job reductions." *Id.* at 123-24. One of the two plaintiffs filed a notice of appeal, although the judgment was of fewer than all claims and fewer than all parties, and there was no certification from the district court under Rule 54(b). *Id.*

(notice of appeal from order granting injunction did not limit scope of appeal to only injunctive relief; quoted language in notice "merely descriptive"); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974).[17]

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at 125. That appeal was eventually dismissed for lack of jurisdiction. *Id.*

When all of the other plaintiffs filed a notice of appeal from the final judgment in the case, those two plaintiffs "did not join in the notice filed that day." *Id.* Eight months later, the district court entered an order awarding a greatly reduced amount of attorneys' fees to the plaintiffs, which was then appealed twelve days later, on February 20, 1980. *Id.*

On appeal, GM argued that the court of appeals was "without jurisdiction to consider points raised by either [of the two plaintiffs]," because one of the two plaintiffs did not attempt to appeal the directed verdict against him at all, and the other one did not file a subsequent notice of appeal after the dismissal of his premature appeal for lack of jurisdiction. The February 20, 1980 notice of appeal referred only to the order awarding attorneys' fees, and not to the earlier, final judgment on the merits of the case, and that appeal had been docketed separately, from the appeal of the final judgment in the case. *Id.* at 125-26. Nevertheless, the court of appeals concluded "that the February 20 notice of appeal is all-embracing as to issues and parties," affording full appellate review. *Id.* at 126. The content of a notice of appeal is to be read liberally, under Fed. R. App. P. 3(c). *Id.* n.10.

[17] *Cobb v. Lewis* was an appeal from the denial of a preliminary injunction against arbitration proceedings in progress. 488 F.2d at 43. The plaintiffs' notice of appeal did not comply with the technical requirements of Rule 3, since they attempted to petition for discretionary appeal under 28 U.S.C. § 1292(b), rather than taking a direct appeal under § 1292(a). The court denied the motion to dismiss the appeal for lack of jurisdiction. *Id.* at 44.

"Courts of appeals have discretion, when the interests of substantive justice require it, to disregard irregularities in the form or procedure for filing a notice of appeal." *Id.* "[T]he two

The October 19, 1992 notice of appeal – from which this appeal ensued – expressly recited the language of the district court's amended judgment that "relieve[d] respondent Butterworth from responsibility [1] for costs and [2] of setting aside Appellee Redner's judgments of conviction."

Given this Court's rulings, (1) that the Florida attorney general's motion was a Rule 59(e) motion; (2) that the district court's May 18, 1992 judgment was not a final, appealable judgment; and (3) that the June 17, 1992 notice of appeal was ineffective; the October 19, 1992 notice of appeal is sufficient, under Fed. R. App. P. 3(c), to give notice that Appellant Dean intended to bring to this Court the substantive issues resolved by the district court's rulings on the merits of the present habeas corpus petition, as finally resolved in that court's only final, appealable judgment – the September 15, 1992 amended judgment. "Courts will liberally construe the requirements of Rule 3" concerning notices of appeal. *Smith v. Barry*, ___ U.S. at ___, 112 S.Ct. at 681.

Even when a notice of appeal is technically defective because it appeals the denial of a postjudgment motion (such as a Rule 59(e) motion to amend the judgment)

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basic objectives of the Rule 3 notice requirement [are] (1) to notify the Court of the taking of any appeal; and (2) to notify the opposing party of the taking of the appeal." *Id.* at 45. The court ruled that the petition filed in the court of appeals sufficed to satisfy the objectives, and therefore the requirements, of Rule 3 concerning notices of appeal; and, additionally, the defendants "ha[d] not shown that they were prejudiced in any way by the [plaintiffs'] technical noncompliance with Rule 3." *Id.* at 46.

instead of the underlying final judgment, the courts consistently "treat the appeal as taken from the final judgment if the appeal is otherwise proper, the intent to appeal from the final judgment is clear, and the opposing party was not misled or prejudiced." *Grubb v. FDIC*, 868 F.2d 1151, 1154 n.4 (10th Cir. 1989). If it is clear that the appellant intended to appeal the underlying judgment, the failure to mention that judgment in the notice of appeal "is not fatal." *Krause v. Bennett*, 887 F.2d 362, 367 n.2 (2d Cir. 1989).[18] The courts will view a technically flawed appeal of an underlying judgment as harmless error, and consider the appeal to be taken from the underlying judgment, *Petru v. City of Berwyn*, 872 F.2d 1359, 1361 & n.3 (7th Cir. 1989), "so long as (1) the judgment from which the moving party intended to appeal is final; (2) it is clear what judgment is involved; (3) the motion and appeal were timely made; and (4) there is no prejudice to the other party." *Id.*

Thirty years earlier, in *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), the Court ruled on a question similar to the motion at hand. The district court had entered judgment on December 19, 1960, dismissing the complaint for failure to state a claim under Rule 12(b)(6). *Id.* at 179, 83 S.Ct. at 228. The next day, the plaintiff filed a motion to vacate the judgment and to amend the complaint. On January 17, 1961, the plaintiff

---

[18] In *Krause v. Bennett*, the notice of appeal specified "the final judgment entered on [November 14, 1988]," although the judgment "was entered on March 20, 1987." 887 F.2d at 367 n.2. Despite the "technically inaccurate" notice of appeal, "it [was] clear that [the appellant] intend[ed] to appeal from the judgment entered in March 1987." *Id.*

appealed the adverse judgment of December 19; and on January 23, 1961, the district court denied the plaintiff's motions. Three days later, the plaintiff filed a notice of appeal from denial of the motions. *Id.* On appeal, the parties briefed the merits of the judgment of dismissal, as well as the denial of the motions. *Id.* at 179-80.

The court of appeals ruled that (1) the motion to vacate was the equivalent of a motion under Rule 59(e); (2) the first notice of appeal was premature and ineffective; and (3) the second notice of appeal was only from the order denying the motion to vacate, and not the original judgment dismissing the complaint. *Id.* at 180-81, 83 S.Ct. at 229. The Supreme Court reversed. Even accepting the court of appeals' characterization and "treatment of the motion to vacate as one under Rule 59(e)," that court erred "in so narrowly reading the second notice." *Id.* at 181, 83 S.Ct. at 229.

> The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points which she intended to rely on appeal, submitted to both respondent and the court pursuant to

> rule, similarly demonstrated the intent to challenge the dismissal.
>
> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.

Id., 83 S.Ct. at 229-30.

In *Davis v. Locke*, 936 F.2d 1208 (11th Cir. 1991), the plaintiff obtained a verdict against two of the defendants, but a third was acquitted. The plaintiff then "moved for a new trial as to the final judgment in favor of [that defendant]." *Id.* at 1211. While that motion was pending, the two defendants against whom a verdict had been returned appealed the denial of their motion for JNOV. This Court dismissed that appeal as lacking jurisdiction, because of the plaintiff's pending motion for new trial.

After the motion for new trial was denied, the two defendants filed a document entitled 'Amended Notice of Appeal.' Later, the court awarded the plaintiff attorney's fees and the defendants filed a document entitled 'Second Amended Notice of Appeal.' *Id.*

The plaintiff argued that this Court lacked jurisdiction over the defendants' "appeal because their notices of appeal were filed untimely," and "the amendments [were] inconsequential because 'a notice of appeal that is void at the outset cannot by amendment become anything other than void.' " *Id.* Declaring that "notices of appeal are to be liberally construed," *id.*; and that the plaintiff had "presented no evidence that he might be prejudiced by . . . acceptance of the appeal," *id.* at 1212; this Court "construe[d] the 'amended' notices of appeal without

reference to the original, invalid notice of appeal and proceed[ed] to the merits of [the] case." *Id.*

After a nonjury trial, the court in *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), awarded the plaintiff lost wages for the time he was unable to work due to injury. The district court granted the plaintiff's motion for reconsideration, and by a supplemental order amended the judgment to include an amount of damages for pain and suffering. Because the defendant's cross-notice of appeal referred only to the amended judgment, the plaintiff claimed that the defendant could not seek appellate review of the items contained in the original judgment.

The court of appeals "reject[ed] [the plaintiff's] attempt to prevent review of the issue based on the content of the notice of cross appeal." *Id.* at 1059, n.1. "[W]e refuse to characterize the [defendant's] cross-appeal as limiting its request for review to the trial court's supplemental order." *Id.*

> Both [the plaintiff's] notice of appeal and [the defendant's] notice of cross-appeal designated as the judgment or order appealed from the district court's order sustaining in part [the] motion for reconsideration of the original judgment. That supplemental order merely added an amount for pain and suffering to the damages awarded in the original judgment. It is clear from the notices of appeal and the briefs filed by both parties that [they] both sought review of the original judgment as amended by the supplemental order.

Id. Accordingly, the full merits of the original judgment, as amended, were before the court of appeals for review.

In *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992), the plaintiff had appealed the court's order denying amendment of the judgment, but did not state its intention to appeal the entire case. *Id.* at 1147. The defendant contended that the plaintiff had failed to appeal effectively "the order dismissing its action and granting summary judgment." *Id.*

The court ruled that, although having failed to comply with the formal requirements of Fed. R. App. P. 3(c), the plaintiff was nonetheless entitled to appeal the entire case. *Id.* at 1147-48.

> Interpreting notices of appeal liberally, this Court often has exercised its appellate jurisdiction – despite an improper designation under Rule 3(c) – where it is clear that the appealing party intended to appeal the entire case. . . . Without question, [the plaintiff] intended to appeal the entire case: while its notice of appeal did not specifically state that the plaintiff appealed the entire case, the notice of appeal specifically challenged the dismissal of [the plaintiff's] action and a summary judgment in favor of the defendant.

Id. at 1148. *See Osterberger v. Relocation Realty Serv. Corp.*, 921 F.2d 72, 73 (5th Cir. 1991) (appeal of order denying motion for new trial was from entire adverse judgment; intent to do so clear).

CONCLUSION

The district court's September 15, 1992 amended judgment is the only final and appealable judgment in this habeas corpus case. That judgment incorporated all the rulings produced by the district court in its earlier, nonfinal May 18, 1992 judgment, including the merits of Appellee Redner's petition for writ of habeas corpus. Appellant Dean's October 19, 1992 notice of appeal sufficiently appealed all the substantive rulings inherent in the district court's September 15, 1992 amended judgment.

Accordingly, the merits of Appellee Redner's challenge to the constitutionality of the Citrus County adult-entertainment licensing ordinance are properly presented and pending before this Court, in this habeas corpus case, by appellant's brief. The motion to strike or dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 3 copies of this Response to Motion to Strike or Dismiss have been sent by overnight delivery to the United States Court of Appeals for the Eleventh Circuit; and copies have been served by U.S. Mail, on this 6th day of May, 1993, upon:

Luke C. Lirot, Esquire, 2000 North Magnolia Drive, Clearwater, Florida 34624, Attorney for Appellant, Joseph Richard Redner; and

Rebecca Roark Wall, Esquire, Assistant Attorney General, 210 Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, Attorney for Appellee, Robert Butterworth, Attorney General of State of Florida.

/s/ Russell W. LaPeer
Russell W. LaPeer
Robert R. Wheeler

No. 92-1991

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CHARLES S. DEAN,
Sheriff of Citrus County, Florida, and
ROBERT A. BUTTERWORTH, the Attorney General
of the State of Florida,

Petitioners,

v.

JOSEPH RICHARD REDNER,

Respondent.

**Petition for Writ of Certiorari to
The United States Court of Appeals
for the Eleventh Circuit**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED (RESTATED)

1. Whether the Motion of Attorney General Butterworth, Appendix C to Petition, was a Motion pursuant to Rule 59(e), Fed.R.Civ.P., and therefore nullified the previous Notice of Appeal, or whether it was merely an application for collateral relief, related to costs, which does not nullify the Notice of Appeal.

LIST OF PARTIES

Petitioner Dean (who was an Appellant in the proceedings below) was a Respondent in the initial habeas corpus proceedings in the district court. Co-Petitioner Butterworth, the Attorney General for the State of Florida, was also an Appellant in the proceedings below and a Respondent in the district court. Respondent Redner (who was Appellee in the proceedings below) was the Petitioner for the writ of habeas corpus in the district court.

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OPINIONS BELOW

The Order of the Eleventh Circuit Court of Appeals dismissing the appeal below is reported at 935 F.2d 1297 (11th Cir. 1993). The Order is reprinted as Appendix J to the Petition herein.

The Orders of the District Court are unpublished and are reprinted as Appendices A and G to the Petition.

JURISDICTION

The Court has jurisdiction to review the Order of the Eleventh Circuit Court of Appeals, pursuant to 28 U.S.C. § 1254(1). Petitioner timely invoked the jurisdiction of this Court.

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS

Rule 54(d), Fed.R.Civ.P.:

"**Costs.** Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; ..."

Rule 58, Fed.R.Civ.P.:

"**Entry of Judgment.** ... Entry of judgment shall not be delayed for the taxing of costs."

Rule 59(e), Fed.R.Civ.P.:

"**Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 4(a)(4), Fed.R.App.P.:

"If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: ... (iii) under Rule 59 to alter or amend the judgment ..., the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying *any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above*. No additional fees shall be required for such filing." (Emphasis Added).

28 U.S.C. § 1291 states:

"The courts of appeal (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court ..."

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STATEMENT OF THE CASE

As correctly stated in the Petition, this matter began as a habeas corpus proceeding in the United States District Court, Middle District of Florida. Respondent, Joseph Richard Redner (Redner), sued the Sheriff of Citrus County, Florida, Charles S. Dean (Dean), alleging as petitioner in the district court that he was illegally "restrained" because the Citrus County Ordinance under which he was convicted was unconstitutional. As a procedural requirement, the Attorney General of the State of Florida, Robert Butterworth (Butterworth) was named as a respondent, as the chief law enforcement officer of the state.

On May 18, 1992, the district court approved in its entirety the report and recommendation of the magistrate judge to whom the matter had been referred, which concluded that the underlying ordinance was unconstitutional. An order granting the petition for writ of habeas corpus was entered, directing that "the necessary steps be taken to set aside [Respondent Redner's] conviction and to discharge him from any restraint." A judgment in a civil action was entered in accordance with the order, allowing for the assessment of costs pursuant to 28 U.S.C. § 1920 (Petition Appendix A).

On May 20, 1992, Butterworth filed a motion with the district court entitled "Motion for Relief from Judgment, Motion to Amend Judgment" (Petition Appendix C). In the motion, the Attorney General requested that any costs assessed pursuant to the civil judgment be assessed against Dean only, and that the *judgment be amended to relieve Butterworth from the other requirements of the judgment*. This requested relief was consistent with an earlier motion

filed by the Attorney General, moving to delete the state as a party because, "the state's interest in the instant proceeding was peripheral," and pointing out that Redner had been detained in the county jail not, as the result of the State of Florida's actions, but as the result of the Citrus County ordinance (See Petition Appendix C; pp. C1, C2). The Motion for Relief from Judgment, Motion to Amend Judgment (Petition Appendix C) specifically invoked Rule 59(e), Fed.R.Civ.P. as its jurisdictional basis.

Apparently failing to appreciate the provisions of Rule 4(a)(4), Fed.R.App.P., which states essentially that any motion timely filed under Rule 59 tolls the time for filing a notice of appeal, and any notice of appeal filed before the disposition of a Rule 59 motion shall have no effect, Dean filed on June 17, 1992, a notice of appeal from the district court's May 18, 1992, civil judgment (Petition Appendix B).

On June 22, 1992, Attorney General Butterworth filed a Notice of Premature Filing of Notice of Appeal, specifying the pendency of the Rule 59 motion and the application of Rule 4(a)(4), Fed.R.App.P. (Petition Appendix E). Nonetheless, on August 19, 1992, the United States Court of Appeals for the Eleventh Circuit requested jurisdictional briefs regarding the effectiveness of the June 17, 1992, notice of appeal.

On September 15, 1992, the district court granted the motion of the Florida Attorney General (Petition Appendix G), and entered an amended judgment "to relieve Co-Petitioner Butterworth from the responsibility for costs and of setting aside [Respondent Redner's] judgment of conviction" (Petition Appendix H). On October 13, 1992, Dean filed a second, separate notice of appeal, appealing

only the September 15, 1992 amended civil judgment (Petition Appendix I).[1]

On January 20, 1993, the Eleventh Circuit properly evaluated the import of Rule 59(e) Fed.R.Civ.P., and Rule 4(a)(4) Fed.R.App.P., and dismissed the appeal from the May 18, 1992, judgment "for lack of jurisdiction" (Petition Appendix J).

The instant petition for writ of certiorari seeks review of the court of appeals' January 20, 1993, dismissal of the original appeal, suggesting that the circuit court improperly misconstrued the Florida Attorney General's post-judgment motion "concerning costs as a Rule 59(e) motion ..."[2] Even though the attorney general's motion specifically identifies Rule 59(e) as its jurisdictional basis and the motion does not simply concern costs, but was clearly a "Motion for Relief from Judgment, Motion to Amend Judgment", Petitioner Dean asserts this conflicts with decisions from this Court concerning the collateral nature of post-judgment motions and orders "addressing issues of costs."

The Eleventh Circuit made no error, and the instant Brief in Opposition to Petition is filed to establish this fact.

---

[1]Whether this second Notice of Appeal encompassed the entire judgment of the District Court is presently pending before the Eleventh Circuit Court of Appeals (Case No. 92-3033, see, e.g., Petition at 4, footnote 5, Appendix M), and is not before this Court in this matter. The sole issue in this appeal is the validity vel non of the original notice of appeal.

[2]Petition for Writ of Certiorari, p. 5.

SUMMARY OF THE ARGUMENT

The Attorney General's Motion for Relief from Judgment, Motion to Amend Judgment was a motion under Rule 59(e), Fed.R.Civ.P., and it had the effect of nullifying the Notice of Appeal filed during its pendency. Therefore, there was no timely Notice of Appeal, and the Eleventh Circuit Court of Appeals properly dismissed the Appeal.

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ARGUMENT

I. THE ATTORNEY GENERAL'S MOTION FOR RELIEF FROM JUDGMENT, MOTION TO AMEND JUDGMENT WAS A MOTION UNDER RULE 59(E), FED.R.CIV.P., AND IT HAD THE EFFECT OF NULLIFYING THE NOTICE OF APPEAL FILED DURING ITS PENDENCY. THEREFORE, THERE WAS NO TIMELY NOTICE OF APPEAL, AND THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY DISMISSED THE APPEAL.

The gravamen of Petitioner's argument to this Court is that the Attorney General's Motion was a *collateral* attack on the judgment, dealt *only* with costs, and did not go to the substance of the judgment. This argument is entirely without merit.

As set forth in the Statement of the Case, *supra*, the Attorney General's Motion sought to alter or amend the District Court's original judgment in two material respects: with respect to the responsibility to release Redner from custody, and with respect to the responsibility for Redner's costs in this petition. Petitioner Dean misstates the legal and factual bases of the Attorney General's Motion.

The Attorney General's interest in being relieved from responsibility to release Redner from custody was not a minor interest. Although all parties concur that the Attorney General is, for the most part, a nominal party to this action, if the invalidity of the ordinance pursuant to which Redner was incarcerated and restrained is maintained, then Redner has very significant claims against all those held responsible for his incarceration, not only for his wrongful incarceration, but also for the loss of business

and the other actual damages he suffered. This concern goes far beyond the collateral issue of costs.

It was thus obviously of great importance to the Attorney General that the final judgment of the district court in this habeas corpus action be amended to relieve the Attorney General from all the requirements enumerated in the original judgment. This consideration included several issues far more elaborate than simply the costs awarded by the district court.

Therefore, even if Petitioner has properly argued the law with respect to the cost aspect of the Attorney General's Motion (and Redner contends that he has not), the other prong of the relief sought by the Attorney General (to be relieved from responsibility for Redner's continued incarceration) clearly was fundamental to the original judgment and was a Motion to Alter or Amend a Judgment, fully within the meaning of Rule 59(e), Fed.R.Civ.P.

In addition to the obvious factual considerations:

- That the Attorney General's Motion was styled in part, a Motion to Amend Judgment;
- That the Attorney General's Motion invoked Rule 59(e), Fed.R.Civ.P.
- That the District Court *ultimately did amend* its judgment,

it is self-evident that the Attorney General's motion went to the fundamental merits of the original judgment of the district court--responsibility for Redner's incarceration, and not simply the collateral issue of costs.

Petitioner's arguments related to motions for attorney's fees not having an impact on the finality of a judgment are accurate but immaterial and misleading. Attorney's fees are clearly a collateral issue, totally unrelated to the merits or fundamental findings of a final judgment. Had the Motion before the district court been related to attorney's fees, Redner would concede that the original Notice of Appeal was timely and valid. In any event, however, there was *never* an issue regarding attorney's fees before the district court or the Eleventh Circuit.

Even Petitioner's efforts to rely on the law related to motions to tax costs do not change the fact that Petitioner's initial notice of appeal was untimely and invalid. The cases cited by Petitioner on this point generally go to the consideration of an *original* order on the issue of costs. In the instant case, the final judgment, prior to its amendment, disposed of the issue of costs.

The Amended Final Judgment amended the responsibility for the costs, but did not originally award costs. Therefore, even solely on the issue of costs, the Motion and Order both fall under the purview of Rule 59(e), and nullified the original notice of appeal as specifically stated in Rule 4(a)(4) Fed.R.App.P.

However, in the instant case, the Attorney General's Motion, and the resulting Order, dealt with far more than the issue of costs. They both dealt with the immediate issue of custody and, by implication, the longer term issue of civil liability to Redner.

Further proof of the full scope of the Attorney General's concerns is found in the Attorney General's earlier motion to be dismissed from this case, which the

district court rejected. However, when the final judgment was entered, and became available as a predicate to liability, the proper amendment to the final judgment had the effect of addressing the merits of the action, and of relieving the Attorney General of the responsibility for Redner's wrongful restraint, and thus of potential liability.

These facts leave absolutely no question that this prong of the Attorney General's motion was a request to amend judgment as contemplated by, and under the purview of Rule 59(e), and therefore clearly nullified the original notice of appeal.

As Petitioner notes (Petition, p. 7):

> "By the 1979 amendments to the Federal Rules of Appellate Procedure, 'the district court was given express authority to entertain a timely motion to alter or amend the judgment under Rule 59, even after a notice of appeal has been filed.' *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). [3] 'The 1979 amendments eliminated the potential for conflict' between courts of appeal and district courts having concurrent jurisdiction to modify simultaneously the same judgment, 'by depriving the courts of appeal of jurisdiction in such (Rule 59) situations.' *Id.* at 60, 103 S.Ct. at 403.

As this Court stated in *Griggs*, with the timely filing of a Rule 59 Motion, the "appeal simply self-destructs."; and

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[3] The case upon which the Circuit Court relied, Petition, Appendix J, p. 2.

the notice of appeal is "not merely defective, it [is] a nullity." *Id.* at 60, 61, 103 S.Ct. at 403. In this case, Dean's original Notice of Appeal has self-destructed, and the Eleventh Circuit was correct in its ruling.

In *Griggs*, this Court went on to hold:

> "Under the plain language of the current Rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal 'must be filed.' In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction of to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional." *Id.*

Also, as this Court noted in *Buchanan v. Stanships*, 485 U.S. 265, 108 S.Ct. 1130, (1988), assessment of costs "does not involve reconsideration of any aspect of the decision on the merits." *Id.* at 485 U.S. 265, 108 S.Ct. 1131-32. *But in this case, costs had already been assessed, and the motion was to amend that assessment.* Further, the District Court's Order *specifically amends* its previous judgment with respect to the role of the Attorney General.

Dispositive of the entire basis for the Petition is the fact that the Attorney General's Motion had a second prong beyond the issue of costs: the Attorney General also sought to amend the judgment to relieve him from responsibility for Redner's incarceration. Therefore, the Attorney General's Motion was not collateral to the element of the judgment, but rather went to the fundamental and jurisdictional issues of release from custody and, implicitly, liability for any illegal restraint.

Petitioner suggests that the decision of the Court of Appeals "inexplicably", in this case, departed from its previous holdings, in *Alimenta, Inc. v. Anheuser-Busch Co.*, 803 F.2d 1160, (11th Cir. 1986); and *Lucas v. Florida Power & Light Co.*, 729 F.2d 1300 (11th Cir. 1984). The Circuit Court's dismissal is not inexplicable, it is completely consistent with the distinction between original applications for costs and applications to amend cost awards. Further, the Eleventh Circuit properly recognized the critical, fundamental and jurisdictional fact that the Attorney General's Motion sought relief not only on the issue of costs, but also on the issue of custody, and, undeniably, the potentiality of liability for illegal custody.

Further, dispositive of this issue, is a holding of the Third Circuit:

> "We are not insensitive to the fact that this result places upon the party seeking to appeal the obligation to determine for itself whether a motion denominated as a Rule 59(e) motion does in fact fall within the parameters for which the rule is designed. Nonetheless, we believe that result is mandated by the Supreme Court's decision in *Buchanan* [*supra*]. We recognize that in some cases there may be sufficient ambiguity in the motion itself to lead a court of appeals to hold that the motion acted as a Rule 59(e) motion, in this case it is clear that the motion was designed for only one purpose, *i.e.* to permit the taxation of costs on behalf of the successful party. Thus, on its face, it was collateral to the merits, and there was no ambiguity." *Fincher v. Keller Industries, Inc.* 905 F.2d 691, 693-94 (3d Cir. 1990).

In the instant case, there was no ambiguity on the face of the Motion. It was styled as a Motion for Relief from Judgment, Motion to Amend Judgment, and it invoked Rule 59(e).

Further, the Attorney General's Motion went beyond the simple issue of costs, and went to the fundamental issue of responsibility for releasing Redner from custody.

Therefore, the Eleventh Circuit properly construed the Motion as a Rule 59(e) Motion which had the effect of nullifying the pending Notice of Appeal.

----------♦----------

CONCLUSION

The Circuit Court correctly analyzed the Attorney General's Motion as a Rule 59(e) Motion which nullified the Notice of Appeal, and was therefore correct in its dismissal of the appeal below.

This Court should affirm the result reached by the Eleventh Circuit, and deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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I. A POSTJUDGMENT MOTION FOR RE-ALLOCATION OF COSTS AND RESPONSIBILITY CONCERNING CRIMINAL CONVICTIONS, IN A HABEAS CORPUS CASE, IS NOT A RULE 59(e) MOTION.

A postjudgment motion, in a habeas corpus case, to have costs and responsibility for the petitioner's conviction reallocated, is still only a motion collateral to the issues constituting the merits of the case. The notion that the post judgment motion of Co-Petitioner Butterworth, the Attorney General of Florida, was based on a "concern [that] goes far beyond the collateral issue of costs" – "the longer term issue of civil liability to [Respondent] Redner"[1] – is mistaken as a matter of law.

A. The State of Florida, directly or through the Attorney General in his official capacity; and the Attorney General in his personal capacity, are immune from civil-rights liability for damages alleged to have resulted from wrongful criminal convictions and incarceration.

Neither the attorney general,[2] as the principal constitutional officer charged with representing the interests of the State of Florida, nor the State itself, has any exposure to civil liability to Redner for damages. The State of Florida may not be sued by Respondent Redner for civil-rights liability, on account of allegedly wrongful incarceration, – either directly, or indirectly through the attorney general in his official capacity,[3] in the state or federal

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[1] See Brief in Opposition to Petition for Writ of Certiorari (Brief in Opposition), at 8-9, 10.

[2] Redner is inconsistent in his description of the attorney general's role in this lawsuit. On the one hand, Redner argues that the attorney general "is for the most part, a nominal party to this [habeas corpus] action." *Id.* at 8. On the other hand, Redner claims that the attorney general has significant concerns and interests in avoiding the claims of Redner, "not only for his wrongful incarceration, but also for the loss of business and other actual damages he suffered." *Id.* at 8-9.

[3] "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985). As such, it is no

courts – because "a State is not a person within the meaning of § 1983." *Will v. Michigan Dep't. of State Police*, 491 U.S. at 66, 109 S.Ct. at 2308.

Additionally, for claims by Redner in the federal courts, the Eleventh Amendment[4] is a constitutional bar that disposes of any risk to the State for damages because of allegedly

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different from a suit against the State itself." *Will v. Michigan Dep't, of State Police*, 491 U.S. 58, 70, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45 (1989). "[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983." *Id.*, 109 S.Ct. at 2312. "State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them." *Hafer v. Melo*, ___ U.S. ___, ___, 112 S.Ct. 358, 362, 116 L.Ed.2d 301 (1991).

[4] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although not explicit in its terms, this Court has interpreted the Eleventh Amendment to establish that "an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). Absent waiver, neither a state nor agencies under its control may "be subject to suit in federal court." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, ___ U.S. ___, ___, 113 S.Ct. 684, 688, 121 L.Ed.2d 605 (1993). "However, the state's consent must be unequivocally expressed." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 99, 104 S.Ct. at 907.

The Eleventh Amendment bar to suit is not absolute: "States may consent to suit in federal court, . . . and, in certain cases Congress may abrogate the States' sovereign immunity." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S.Ct. 1868, 1872, 109 L.Ed.2d 264 (1990). "The Court has held that, absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. . . . This bar remains in effect when State officials are sued for damages in their official capacity." *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107, 87 L.Ed.2d 114 (1985).

Although 42 U.S.C. § 1983 "provides a federal forum to remedy many deprivations of civil liberties . . . it does not provide a federal forum for litigants who seek a remedy against a state for alleged deprivations of civil liberties." *Will v. Michigan Dep't. of State Police*, 491 U.S. at 66, 109 S.Ct. at 2309. "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the Federal-State balance in that respect." *Id.* "Section 1983 was [not] intended to disregard the well-established immunity of a state from being sued without its consent." *Id.* at 67, 109 S.Ct. at 2310.

wrongful incarceration. The Eleventh Amendment is a "withdrawal of jurisdiction [that] effectively confers an immunity from suit." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, ___ U.S. at ___, 113 S.Ct. at 687.

> Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, . . . and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, ___ U.S. ___, ___, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991).

After reviewing the scope of Article III of the Constitution, this Court has determined that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.' " *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 98, 104 S.Ct. at 906, quoting *Hans v. Louisiana*, 134 U.S. at 15, 10 S.Ct. at 507.

> *"[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given:* not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

Id. at 98, 99, 104 S.Ct. at 907 (emphasis in original). "This ban exists whether the relief sought is legal or equitable." *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2032, 2939, 92 L.Ed.2d 209 (1986).

Furthermore, any later claim by Respondent Redner, against the Attorney General of Florida, in his personal capacity, will collide immediately with the decisions of this Court, and from the courts of appeals: for representing the interests of the State, as its chief legal officer, in litigation to uphold the constitutionality of legislation – even if it were ultimately overturned as invalid –, the Florida attorney general is immune from damages claims for civil-rights liability.[5]

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[5] The attorney general, in his personal capacity, enjoys absolute prosecutorial immunity from suit and liability for civil-rights claims based on his role as the State's chief prosecutor.

> [I]mmunity from suit under § 1983 is "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976), and officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue.

Hafer v. Melo, ___ U.S. at ___, 112 S.Ct. at 363.

Since a "functional" approach should be used with immunity law, *Cleavinger v. Saxner*, 474 U.S. 193, 201, 106 S.Ct. 496, 501, 88 L.Ed.2d 507 (1985), an official "performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts." *Butz v. Economou*, 438 U.S. 478, 515, 98 S.Ct. 2894, 2915, 57 L.Ed.2d 895 (1978). (Department of Agriculture official absolutely immune from suit when acting as prosecutor by initiating administrative proceeding.)

> "[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. at 342, 103 S.Ct. [at] 1119. Absolute immunity flows not from rank or title or "location within the Government," *Butz v. Economou*, 438 U.S., at 511, 98 S.Ct. at 2193, but from the nature of the responsibilities of the individual official.

Cleavinger v. Saxner, 474 U.S. at 201, 106 S.Ct. at 501. "[T]hose officials who are responsible for the decision to initiate or continue a proceeding subject to . . . adjudication are entitled to absolute immunity from damages liability for their parts in that decision." *Butz v. Economou*, 438 U.S. at 516, 98 S.Ct. at 2916.

As chief law enforcement officer of the State, the attorney general possesses the powers and duties that exist under common law.

> The office of attorney general is older than the United States and is older than the State of Florida. As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion; the volume and variety of legal matters involving the crown and the public interest made such limited

These bars against later, civil-rights liability to Redner, by the State of Florida, and by the Florida attorney general personally, make illusory the hypothetical "concern" of the attorney general over subsequent civil liability, as a reason for his postjudgment motion to have addressed the merits of the district court's judgment.

> independence a practical necessity. Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.
>
> As a result, the attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law.

State ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268 (5th Cir. 1976), *cert. denied sub nom, Standard Oil Co. of Cal. v. Florida*, 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 192 (1976). The attorney general must "exercise all such power and authority as public interests may require from time to time." *State ex rel. Landis v. S.H. Kress & Co.*, 155 So. 823, 827 (1934). "The attorney general's authority runs beyond responsibility to the government *qua* government. He is responsible to the people." *Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir. 1983), *cert. denied*, 466 U.S. 962, 104 S.Ct. 180, 80 L.Ed.2d 562 (1984).

Fla. Stat. § 16.01(4) & (5) sets forth the attorney general's responsibilities in his role as a prosecutor for the State of Florida:

> (4) Shall appear in and attend to, in behalf of the State, all suits or prosecutions, civil or criminal or in equity, in which the State may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this State.
>
> (5) Shall appear in and attend to such suits or prosecutions in any other of the courts of this State or in any other courts of any other state or of the United States.

The courts of appeals have consistently recognized the absolute immunity of States' attorneys general for actions taken in furtherance of their duties as chief prosecutor. *See Meade v. Grubbs*, 841 F.2d 1512, 1531 (10th Cir. 1988) (Oklahoma attorney general enjoys absolute immunity regarding decisions to prosecute); *Fullman v. Graddick*, 739 F.2d 553, 558-59 (11th Cir. 1984) (Alabama attorney general absolutely immune for activities taken within role as prosecutor); *Ledwith v. Douglas*, 568 F.2d 117, 119 (8th Cir. 1978) (claims against Nebraska attorney general barred by doctrine of prosecutorial immunity); *Prince v. Wallace*, 568 F.2d 1176, 1178-79 (5th Cir. 1978) (Alabama attorney general absolutely immune for actions taken within scope of duties as prosecutor).

B. A postjudgment motion requesting a redetermination of costs, remains collateral to the merits of the lawsuit.

Redner acknowledges that the assessment of costs does not involve reconsideration of any aspect of the decision on the merits;[6] but he appears to think that when costs – although collateral, if raised after judgment – are included as a part of the judgment originally, a postjudgment motion that seeks "to amend that assessment" is a Rule 59(e) motion.[7]

Efforts to rationalize the court of appeals' inconsistency below, with its own earlier decisions, in *Alimenta v. Anheuser-Busch Co.*, 830 F.2d 1160 (11th Cir. 1986), and *Lucas v. Florida Power & Light Co., supra,* – not to mention

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[6] Brief in Opposition, at 12.

[7] "But in this case, costs had already been assessed, and the [postjudgment] motion was to amend that assessment." *Id.* On the other hand, Redner is quick to admit: "Attorney's fees are clearly a collateral issue, totally unrelated to the merits or fundamental findings of a final judgment. Had the Motion before the district court been related to attorney's fees, Redner would concede that the original Notice of Appeal was timely and valid." *Id.*, at 10.

In light of this concession, the force of the Eleventh Circuit Court of Appeals' decision in *Lucas v. Florida Power & Light Co.*, 729 F.2d 1300 (11th Cir. 1984), is inescapable:

> The narrow issue in *White [v. New Hampshire Dep't. of Employment Security*, 455 U.S. 455, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982)] was whether a motion for attorney's fees following judgment, under 42 U.S.C. § 1988, constituted a Rule 59 motion to alter or amend the judgment. The Supreme Court held that it did not:
>
> > The federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits [citation omitted]. By contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action – *issues to which Rule 59(e) was never intended to apply.*
>
> *Id.*, 102 S.Ct. at 1166 (emphasis supplied). the Supreme Court's observations with respect to attorney's fees applies with equal if not greater force to costs, for costs must certainly be regarded as collateral to the main cause of action in this case.

Id. at 1301 n.1. Additionally, "[a]t common law, attorneys fees were regarded as an element of 'costs' awarded to the prevailing party." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 1721, 100 L.Ed.2d 178 (1988).

this Court's decisions in *Buchanan v. Stanships, Inc.*, and *Budinich v. Becton Dickinson & Co.* – on a supposed "distinction between original applications for costs and applications to amend cost awards,"[8] are simply wrong.

First, both *Alimenta v. Anheuser-Busch Co.*, and *Lucas v. Florida Power & Light Co.*, were cases in which a party moved for a reassessment of costs that were explicitly set forth in the initial, original judgment,[9] – a situation identical to the case at hand.

Second, any judgment issued by a court necessarily allows the prevailing party to recover costs, regardless of whether costs are specifically mentioned or allocated in the judgment, "unless the court otherwise directs." Fed. R. Civ. P. 54(d).[10] Consequently, any postjudgment motion regarding costs will necessarily be a request "to amend a cost award," because costs are automatically authorized by every original judgment, unless explicitly directed otherwise by the court. Implicit in every judgment that does not expressly forbid it is the right of the prevailing party to an award of properly

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[8] Brief in Opposition, at 13. "The cases cited by Petitioner . . . generally go to the consideration of an *original* order on the issue of costs, [but i]n the instant case, the final judgment, prior to its amendment, disposed of the issue of costs. "*Id.* at 10 (emphasis in original).

[9] In *Alimenta*, the final judgment had required each party to bear its own costs, and the defendant requested a reconsideration of this decision. 830 F.2d at 1162. In *Lucas*, the original judgment stated that the defendant shall recover costs from the plaintiffs, and the plaintiffs moved to alter or amend the judgment with respect to the allocation of costs. 729 F.2d at 1300.

Contrary to Redner's view, other cases relied on in the Petition for Writ of Certiorari also involved a reassessment of costs that had been set forth explicitly in the original judgment (as in the case at hand). *See Fincher v. Keller Ind., Inc.*, 905 F.2d 691 (3d Cir. 1990) (district court rendered judgment in favor of defendant, but specifically denied costs); *Durham v. Kelly*, 810 F.2d 1500 (9th Cir. 1987) (district court judgment provided for each party to bear own costs).

[10] Fed. R. Civ. P. 54(d) provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.

taxable costs, by virtue of Rule 54(d). "Under Rule 54(d), the 'prevailing party' automatically is entitled to costs 'unless the court otherwise directs.' " *Buchanan v. Stanships, Inc.*, 485 U.S. at 268, 108 S.Ct. at 1131-32, quoting 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2679.

In reality and practice, all postjudgment motions concerning costs – even where an original judgment is silent, or expressly denies costs – are ones that are collateral to the merits of the judgment, because they are directed toward amending the cost award, or denial of an award. The attempt to distinguish between "original applications for costs" and "applications to amend cost awards" is ineffectual.

Third, the fact that the attorney general's postjudgment motion requested a reassessment of costs, does not alone supply the distinguishing standard for whether a postjudgment motion is collateral or one under Rule 59(e). The assessment of costs in a judgment may be changed – reassessed – without necessarily revisiting the ruling on the merits of the case as embodied in the judgment.

A "postjudgment motion for costs similarly [seeks] only what is due *because* of the judgment." *Id.* at 268, 108 S.Ct. at 1131 (emphasis in original).

> [T]he opinion in *Budinich [v. Becton Dickinson & Co., supra]*, makes it plain that a motion to allocate costs is not deemed a rule 59 motion, irrespective of whether the merits award incorporates an automatic award of costs. . . .
>
> [I]n *Budinich* the Court made it patent that a motion for costs or attorneys' fees is not to be deemed a rule 59 motion, even where the cost or fee award might be viewed as an integral part of the merits.

Samaad v. City of Dallas, 922 F.2d 216, 218 (5th Cir. 1991).

Finally Redner confuses the point of the Third Circuit's decision in *Fincher v. Keller Ind., Inc., supra,* from which he quotes.[11] What the court of appeals recognized in *Fincher,* was "that in some cases there may be sufficient ambiguity in the motion itself to lead a court of appeals to hold that the motion acted as a Rule 59(e) motion." *Id.* at 694. This is not the situation in the case at hand; and in fact Redner urges just the opposite, that the attorney general's postjudgment motion bore "no ambiguity on [its] face": "[i]t was styled as a Motion for Relief from Judgment, Motion to Amend Judgment, and it invoked Rule 59(e)."[12]

Additionally, Redner's argument ignores the import of this Court's decisions, and those from the courts of appeals, that merely calling a postjudgment motion a Rule 59(e) motion and invoking Rule 59 does not automatically and necessarily make it a Rule 59(e) motion.

> [A] motion for costs filed pursuant to Rule 54(d) does not "seek to alter or amend the judgment" within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply. . . . Respondents' inaccurate designation of their costs request as a Rule 59(e) motion cannot change this fact.

Buchanan v. Stanships, Inc., 485 U.S. at 268-69, 108 S.Ct. at 1132. *See Durham v. Kelly,* 810 F.2d at 1503 ("appellants label[ing] their motion as a Rule 59(e) motion is not dispositive."); *Lucas v. Florida Power & Light Co.*, 729 F.2d at 1302 (notwithstanding that plaintiffs characterized motion as one under Rule 59, "nomenclature is not controlling").

Redner's postjudgment motion requesting a reassessment of costs remains collateral to the merits. Any attempt to

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[11] In *Fincher,* the court stated that the appealability of a judgment in the face of a postjudgment motion, is a matter to be determined by the "party seeking to appeal" – which requires a determination as well about the nature of the postjudgment motion. 905 F.2d at 693.

[12] Brief in Opposition, at 14.

distinguish between postjudgment motions for original applications for costs, and one to amend cost awards, is quelled by Rule 54(d) and by the fact that costs may be redetermined without revisiting the merits of a judgment.

CONCLUSION

A concern by the Florida attorney general – imagined by Redner – about risk of civil-rights liability for damages from the State itself, or from him personally, is fictional. For § 1983 claims in state or federal courts, the State is not a person, either directly, or indirectly through the attorney general in his official capacity; and the Eleventh Amendment is an additional bar against liability for civil damages in the federal courts. In his personal capacity, the attorney general is absolutely immune from suit and liability.

The attorney general's postjudgment motion, requesting a redetermination of costs assessed by the court in the original judgment, remains collateral to the merits of the case, and is not a Rule 59(e) motion, regardless of whether characterized as an "original application for costs" or an "application to amend cost awards."

A writ of certiorari should be issued to the United States Court of Appeals for the Eleventh Circuit, reversing its June 17, 1992 order dismissing the appeal from the district court's May 18, 1991 judgment.

Respectfully submitted,

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